United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,265

46

DALLAS GENERAL DRIVERS, LOCAL UNION 745,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DALLAS GENERAL DRIVERS, LOCAL UNION NO. 745 INTERNATIONAL UNION OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 19,265

PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the Court's approval, hereby stipulate and agree with respect to the issues, joint appendix and date of briefs, as follows:

I. STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board erred in finding that the Company did not violate Section 8(a)(5) and (1) of the Act by reducing wages on or about August 17, 1962.

2. Whether the Board erred in finding that the parties had arrived at a bargaining impasse after the collective bargaining session of August 16, 1962.

Petitioner does not seek review of Board finding that the Company did not violate the Act with respect to refusal to produce financial

records and subcontracting of certain delivery work.

II. THE JOINT APPENDIX

1. The portions of the record to be printed in a joint appendix shall consist of:

a. This prehearing conference stipulation, and the Court's order in connection therewith.

b. Decision and Order of the Board, including the Trial Examiner's Decision.

c. Such portion of the typewritten transcript and the exhibits in the Board proceeding as each party shall respectively designate.

2. Each party will pay the costs of what it designates; Petitioner bearing the cost of printing items (a)and (b) above. Petitioner will serve its designation on the other parties on or before May 18, 1965. The Board will serve its designation on or before May 25, 1965, and the Company will serve its additional designation on or before June 1, 1965. The Board will be responsible for the printing of the joint appendix, and the Board will file and serve it on or before June 18, 1965. Petitioner will file and serve its brief by June 28, 1965. The Board and the Company will file and serve their briefs by July 26, 1965.

3. It is further agreed that any party in the briefs, and the Court at or following the hearing in the case, may refer to any portion of the original transcript of record or exhibits herein which have not been printed or otherwise reproduced, it being understood that portions of the

record thus referred to will be printed in a supplemental joint appendix if the Court directs the same to be printed.

Dated at Washington, D. C.,
this 5th day of March, 1965

/s/ Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Dallas, Texas
this 4th day of May, 1965

/s/ L.N.D. Wells, Jr.
Counsel for the Union

Dated at Washington, D. C.,
this 7th day of May, 1965

/s/ Allen P. Schoolfield, Jr.
/s/
Counsel for the Company

ORDER

Before: Danaher, Circuit Judge,
in Chambers.

The parties in the above-entitled case having submitted a stipulation pursuant to Rule 38(k) of this court, and the stipulation having been considered, it is

ORDERED that the stipulation be approved except that the briefs of the parties shall be filed within the time periods fixed in Rule 18, and it is

FURTHER ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of the court, and the stipulation and this order shall be printed in the joint appendix herein.

Dated: May 17, 1965

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 BEFORE THE NATIONAL LABOR RELATIONS BOARD

Sixteenth Region

In the Matter of:	:	
EMPIRE TERMINAL WAREHOUSE COMPANY	:	
-and-	:	Case No. 16-CA-1722
DALLAS GENERAL DRIVERS, LOCAL UNION 745, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA	:	

Room 233, Southland Hotel,
Dallas, Texas,
Wednesday, March 27, 1963

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock, a. m.

BEFORE:

GEORGE A. DOWNING, ESQ., Trial Examiner

APPEARANCES:

ALLEN P. SCHOOLFIELD, JR., ESQ. -and- HUGH M. SMITH, ESQ.,	Law Offices of Allen P. Schoolfield, Jr., 1200 Republic Bank Bldg., Dallas, Texas, appearing on behalf of the Respondent
SANFORD H. PALMER, ESQ., -and- LEON E. KAHN, ESQ.	National Labor Relations Board, 6th Floor, Meacham Bldg., Fort Worth, Texas, appearing on behalf of Counsel for the General Counsel.
DAVID R. RICHARDS, ESQ.,	Mullinax, Wells, Morris & Mauzy, 1601 National Bankers Life Bldg., Dallas, Texas, appearing on behalf of the Charging Party.

* * * * *

PROCEEDINGS

* * * * *

MR. SMITH: The Respondent admits the allegation of complaint from Paragraph 1 through Paragraph 8. Paragraph 9 is admitted to the extent that request was made, but we deny that the request has been continued. That refers to both Sections (a) and (b).

* * * * *

MR. PALMER: Before we identify these exhibits, the General Counsel proposes to stipulate that the bargaining dates engaged in by the Employer and the Union was July 13, 1962, July 24, 1962, July 30, 1962, August 1, 1962, August 6, 1962, August 15, 1962, August 16, 1962, September 24, 1962, September 27, 1962, October 3, 1962, October 12, 1962, and March 12, 1963.

MR. SMITH: The Respondent so stipulates.

MR. RICHARDS: We so stipulate.

TRIAL EXAMINER: You mean by that the dates of the negotiations?

MR. PALMER: Yes.

TRIAL EXAMINER: The stipulation is received.

MR. PALMER: All right.

Now, the General Counsel and Respondent and the Charging Party have got together and identified certain documents that represent prior contract, interchange of correspondence, and proposals, various documents that were used in the interchange throughout these negotiations. They are marked Exhibits 2 through Exhibit 25. The parties agree as to their authenticity. The parties do not all agree as to their relevancy and materiality, but they are offered at this time into the record.

* * * * *

(The documents above-referred to were marked General Counsel's Exhibits Nos. 2-26 for identification and were received in evidence.)

* * * * *

TRIAL EXAMINER: What was the Union asking for?

MR. SCHOOLFIELD: The Union asked for 25 cents per hour per year increase and a three-year contract in the original proposal. They did state they would come off the 25 cents per hour. The final proposal we got from the Union after the strike was a 5-cent increase after six months, but at all times they wanted increase in health and welfare of 50 cents a week. That's my understanding of the unit proposal.

TRIAL EXAMINER: Now, what happened — I find there is a big blank here. What happened after the strike? Were the employees reinstated?

MR. RICHARDS: They are still on strike.

MR. SCHOOLFIELD: The strike is still continuing. All the strikers were replaced in a day or so when the company continued to operate.

* * * * *

M. H. WAKEFIELD

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Palmer) Will you state your name, please? A. M. H. Wakefield.

Q. And what is your occupation, Mr. Wakefield? A. I work as Assistant Business Agent for Local Union 745, Teamsters Union.

30 Q. All right. Are you familiar with any of the bargaining processes that transpired between your Teamsters Union and the Empire Terminal Warehouse Company? A. Yes, sir.

Q. All right. Now, has your company — has your union ever had contract with the Empire Terminal Warehouse Company? A. Yes, sir.

Q. Are you aware of how long they have had this contract? A. Yes, sir.

Q. How long? A. The first contract run three years, run from August the 17th, 1956 to August 17th, 1959. The last contract run from August 17th, '59, to August 17th, '62.

Q. All right. Now, it's been stipulated that the first bargaining session was July the 13th of 1962. Do you recall that bargaining session? A. Yes, sir, I do.

Q. All right. Now, I am going to hand you Exhibit No. 2 which is a contract that was used during — will you tell us what that exhibit No. 2 is?

31 A. This existing contract had run from August the 17th, 1959, through August 17th, 1962.

Q. All right. Now, who was present at that bargaining session on July the 13th? A. Mr. Schoolfield, Mr. Huntington from the company, Gideon Thomas, who is an employee of the company, and myself.

Q. All right. Now, what happened during that bargaining session? A. This meeting was the proposal — we was meeting with the company to propose a new agreement, a new contract.

Q. All right. Now, what did you do; did you make a proposal? A. Yes, sir, we did.

* * * * *

32 Q. (By Mr. Palmer) Would you go ahead and explain the changes you proposed? A. Yes, sir, I sure will if you'll bear with me for a minute.

The first change in the contract was Article IV, Section 56 — which read as follows: "In case of various — overload — of overload of — variations of workload, employees may be temporarily assigned to other departments, and will be paid at the higher rate of pay if assigned to a higher classified job in excess of four hours at the higher rate of pay for all—" Wait just a minute — "At the higher rate of pay if assigned to a higher classification job in excess of four hours at the higher rate of pay, the employee will be paid at the higher rate for all time worked in excess of four hours."

Q. Pardon me now. To kind of resummarize this now, as I under-

33 stand your testimony, you proposed this contract with certain changes that are noted in the margin? A. That's right.

Q. Would you briefly summarize the changes that show in the margin and explain what those changes are? A. Yes, sir. In the old contract which meant this, if an employee must work — say if he was drawing $2.00 an hour and they assigned him to a job that paid $2.15 an hour, he would have to work as much as four hours before he would go into the higher rate of pay. We proposed that he would be paid for all time worked in the higher classification of pay.

Q. All right.

TRIAL EXAMINER: Does that in the proposal have any effect on the breakdown of the negotiations?

* * * * *

THE WITNESS: The answer was in the breakdown of the negotiations, was more or less of the whole contract in its entirety. The company would not agree to anything.

TRIAL EXAMINER: As I understand, Mr. Palmer, this exhibit is in evidence, and these changes are noted in the margin. Do we need the

34 testimony as to what they consist of?

MR. PALMER: I would like to go to the last page of the contract and summarize the changes of the proposal regarding the wages. I think that is material.

THE WITNESS: In regards to wages in the old contract, we had a rate for checkers and lead men. The union proposed to do away with the lead men and have drivers, checkers and warehousemen and fork lift operators. We wanted to bring the drivers up under the same rate of pay that the checkers were drawing, but the checkers at that time were getting two-fifteen, the drivers were getting two. We wanted drivers and checkers to receive 25 cents an hour increase across the board which has been 90 cents an hour for the following three years for the drivers and 75 cents an hour for the checkers. The warehousemen and order fillers would receive 25 cents per year across the board, which would give them a total of 75 cents an hour for the next three years.

Q. (By Mr. Palmer) Okay. Now, did you explain the wage proposals as are noted in the margin there to the company's negotiators? A. Yes, sir.

Q. All right. A. They was given this contract.

Q. All right. Was there any discussion concerning your proposals
35 by the employer and you at that time? A. No, sir.

Q. There was not. How long did the meeting last? A. I would say that meeting lasted 30 or 45 minutes at the most. I went through this contract and made notes of the changes — said they wanted to take it and study it, and they'd see us later.

* * * * *

37 C. M. ROSEBOROUGH

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Palmer) What is your name, please? A. C. M. Roseborough.

Q. All right. Mr. Roseborough, what is your occupation?

38 A. I'm Assistant Business Representative for Teamsters Local 745.

Q. All right. Now, there is testimony here that your Union has had contract with Empire Terminal Warehouse for a number of years. Are you familiar with the contract negotiations that took place subsequent to July 13th of 1962? A. I am.

Q. All right. Now, when was the next bargaining meeting after July 13th, 1962? Did you attend that meeting? A. Yes, sir.

* * * * *

39 Q. (By Mr. Palmer) Now, will you tell what transpired at the — this negotiating session? A. Yes, sir, we met — it seems to me as if

it were 10:00 o'clock in the morning. The company gave us a counter-proposal — this counter-proposal, of course we hadn't had a chance to study it or anything. Mr. Schoolfield advised it was a counter-proposal that they had promised Wakefield at the previous meeting. I told him that I must have a little bit of time to look the thing over and see if we couldn't work out something, and I suggested that we take our existing contract and their proposal — I mean our proposal and their proposal and try to work from there and see if we couldn't effect some sort of a settlement.

In this proposal there were many, many things that were — we couldn't agree to. I — Allen began to talk to me about economic factors in the contract, and I told him, well, there were many things in there that they had tried to change that didn't affect the — I mean wasn't a cost item, but we went through it and tried to work out something where we could get an agreement. For example, they wanted —

* * * * *

40 Q. (By Mr. Palmer) Now, did you discuss this proposal with them at that time? A. Yes, we did. We attempted to do it.

Q. All right. Now, just explain how you discussed these — A. Well, No. 1, we began talking about, I think we agreed on a preamble. I don't think there is any question about that. The bargaining agent and unit and unit — we were not in agreement because we were leaving off one classification or adding one. I guess we were adding fork lift operators.

They wanted to hold that and take that one under advisement. Then on management rights we had quite a hassle. We couldn't agree on that.

That was — so I think we agreed to hold that. Now, I'd have to depend on a kind of a faulty memory on some of these things. That was some time back. I'm sure that we did not agree on Section IV which was seniority. We didn't agree with the way they wanted it written. The company told us they had to

41 have something on seniority, and it was affecting their cost of operations, and they would have men there that would — maybe they would have to take a checker, for example, and put him in a boxcar and work him at $2.15 an hour when normally it would have been $2.00 an hour.

I told him that I thought possibly we could work something out and come up with some kind of an agreement that would give the company some relief so far as that was concerned. We didn't go into it in detail. We just discussed all these things. We just discussed, well, generally at that first session. For example, they wanted to change a 30-day probationary period. The company wanted 60, and they wanted to establish qualification tests on promotions and such as that, and they wanted to be the sole judge, and we didn't want to agree to it. We thought that a man should have some recourse if he were or had been discriminated against.

Well, the fact of the matter is we just didn't agree on anything that amounted to anything; anything that was really important would either get a no, or we'd say, "Well," — or they'd say, "Well, we'll take this under advisement, and we'll give you an answer." Well, the answers weren't forthcoming. It could be in some instances, but very seldom. That's just about what it amounted to in that first session.

42 Q. Now, how long did this session last, if you recall? A. Well,

probably an hour and a half, maybe an hour and 45 minutes, I am not sure.

Q. All right. In other words, your testimony is that you did go completely through the company's proposals? A. No, we didn't get clear through it.

Q. About how far did you get? A. We got down, I think — I didn't say here. I'll have to look, but I think Allen — Mr. Schoolfield told me they had another proposal on something, and I have forgotten what it was. And they'd give me another answer on that one. I have forgotten how far we got on it.

Q. Well, was the lie detector test involved in this proposal? A. It was mentioned, yes. And we objected to it. We thought that, No. 1, they weren't accurate. We thought that while we agreed with the company that we didn't agree that a man should be or should hold a job if he'd been guilty of thievery or larceny, that we thought that he should have every right to prove his innocence or guilt and we didn't think the polygraph test was the way it should be done.

Q. All right. A. And we had quite a hassle over that one. I think I advised Mr. Schoolfield that I wouldn't want to take one, and I didn't think the men should either.

43 Q. All right. Was there any discussion of wages at that — during that session? A. No, I don't think there was, not in the first session.

Q. All right. This was the first session you attended which was July the 24th? A. Yes, sir.

TRIAL EXAMINER: Did the company's proposal have any provision

in it for wage rates?

THE WITNESS: No, sir.

MR. PALMER: That was the next question that I was going to ask — there was no provision for any wage rates?

THE WITNESS: No, sir.

Q. (By Mr. Palmer) All right. Now, the next session was July the 30th, 1962. Do you recall that meeting? A. Well, I recall the meeting, Mr. Palmer. I have some notes here if I could look at them.

* * * * *

44 Q. All right. Now, do you remember, to the best of your recollection, what happened on July the 30th as far as negotiations? A. Mr. Palmer, it's going to be hard for me to remember what happened at each meeting, and even the notes I have aren't too good on some of it.

* * * * *

45 Q. All right. Now, did you all reach any agreement on any matters during or about July the 30th — meeting? A. If we reached an agreement on any matter, it was something where there was no change, that was more or less insignificant, or I think that was all. Actually we couldn't agree on anything.

Q. All right. Now, do you remember the meeting on August the 1st, 1962? A. Yes, August the 1st — that was held also in the Travis Hotel. The meeting was — I think we had that meeting at 10:00 in the morning. Now, these hours, I may be wrong —

TRIAL EXAMINER: They're not important.

THE WITNESS: We went into the thing, and again we began, and

I wanted to start all over again and see if we could resolve some of the things so we could get them out of the way. Then we could get into the other matters that were really important so far as fringes, so far as money was concerned, and seniority and such as that. It seemed that we weren't getting anywhere so I suggested that we call in the Federal Mediation Conciliation Service and ask for their help. The company agreed to it, and I made a phone call from the hotel —

* * * * *

46 Q. (By Mr. Palmer) All right. Now, try to remember as much as you can about what happened on August 1st with regard to the negotiations.

A. There wasn't very much happened except that Allen or Mr. Schoolfield kept asking me, well, how about a wage proposal. I told him that we had given the wage proposal, and we thought probably the next move was up to the company, that they hadn't given us any reason to believe that they couldn't pay more money. His advice to me was that they weren't pleading poverty or anything like that, that they had a lucrative business, and my statement back to them was, "You — all of you are making a profit now. You still want to make more profit." And I said, "We can't agree to it until I have some proof."

TRIAL EXAMINER: As proof of what?

THE WITNESS: That they couldn't afford to pay more money.

TRIAL EXAMINER: They didn't deny that they could pay more?

47 THE WITNESS: No, they didn't.

Q. (By Mr. Palmer) Now —

TRIAL EXAMINER: Did they admit that they wanted to make more profit?

THE WITNESS: Yes, sir.

Q. (By Mr. Palmer) All right. Is this all you can remember about the meeting? A. That's all I can remember about that one, Mr. Palmer. I remember I called the Federal Mediation from the hotel, and I'm not sure we set the meeting then or whether it was later. I don't remember.

Q. All right. Now, will you please refer to your notes and refresh your memory as to what transpired at that meeting?

* * * * *

48 TRIAL EXAMINER: Would you look in your notes and see whether it's mentioned? Now we're talking about August the 1st, what request you made for wage information — financial information rather?

THE WITNESS: Well — all right. In the last paragraph the Union requests permission to look at the Company's books; such request was denied by the Company. The paragraph above that, the Union asked the company if they were pleading inability to pay or poverty. Mr. Schoolfield

49 replied that Empire Terminal Warehouse Company was a going business and had showed a profit and were not pleading inability to pay. However, he insisted that the Company was not in a competitive position with other companies and would not agree to any kind of a wage increase at this time.

* * * * *

51 Q. (By Mr. Palmer) All right. Now, the next meeting was August the 6th? A. Yes, sir.

Q. Now do you recall that the letter written by the Company to you about the wage change, which was dated August the 8th, was dated — I'm just — I'm just using that incident to identify and refresh your memory about August the 6th.

Now, will you please tell us about what happened during negotiations on August the 6th? A. On August the 6th the meeting was held in the Federal Mediation and Conciliation Service Room. At that time the discussion was very short. I believe Mr. Morrow was the Commissioner; this discussion was very short. He had the Company in one room. He had us off in another. I told — Allen came out and asked me, said, well, he said, "Rosie, how about a wage proposal?" My statement to him was that we hadn't been able to resolve anything, and I just couldn't see how we

52 could get down to the cost items until we could get the basic things in the contract worked out. They came in a little bit later, and the Company hadn't changed their position so far as anything was concerned. And I suggested —

Q. Pardon me. Had the Union made a wage proposal at that time? A. No, sir.

Q. I mean the Employer made a wage proposal at that time? A. No, sir, not on the 6th of August, no, sir.

Q. All right. Pardon me. Proceed. A. We — I suggested then that we were getting up close to the expiration of the contract, and I asked the Company if they'd be willing to extend the contract and let the men go on working. And I believe at that time I asked them to pay an additional

50 cents a week on the health and welfare and let them go on working and let us go ahead and work from there, and I'd go back and meet with the men and see if I could get them to agree to a lesser wage offer. They said they would let me know. I think they said they would write me or call me.

Q. All right. Was that the last thing that was done at the meeting? A. Well, in the meeting they submitted to me a survey of warehouses in Dallas and Houston. I told them I'd look at them and listen to them, but I

53 wasn't interested in them because I was dealing with Empire Terminal Warehouse Company.

TRIAL EXAMINER: You have contracts with any of these other companies?

THE WITNESS: No, sir.

TRIAL EXAMINER: Were any of those companies under contract with other unions?

THE WITNESS: Not to my knowledge, sir.

* * * * *

54 Q. (By Mr. Palmer) Mr. Roseborough, we were talking about — you were testifying in regard to the negotiation meeting of August the 6th. A. Yes, sir.

Q. You testified that you met with Federal Mediator Tom Morrow. Is that correct? A. Ted Morrow.

Q. Ted Morrow, all right. Can you just summarize the results of this meeting now? A. Well, —

Q. All right. Now, you testified that you proposed that they extend

the contract. Is that correct? A. Yes, sir.

Q. And now how was this made, what did you say? A. Well, I suggested verbally that we extend the contract at the contract rate, the one that was in existence then, and that I go back with the men and have a meeting with them and see if I couldn't get them to accept a lesser offer in wages. The Company advised me — with — the fact that I wanted 50 cents increase in health and welfare. We had one man down there, his wife had leukemia, and we knew there would be some more benefits, and I was trying to get those benefits in there. The rest of it was just a matter of keeping the men working and see if we couldn't work out some kind of an agreement.

TRIAL EXAMINER: Did Mr. Schoolfield say how much the Company would agree to pay?

THE WITNESS: No, sir, you are speaking of any time up to August —

TRIAL EXAMINER: No, August the 6th, on August the 6th — did he say it?

THE WITNESS: No, sir.

Q. (By Mr. Palmer) All right. Did anything else happen that you remember of then besides — what did Mr. Schoolfield say to this? A. They said they would give me an answer.

Q. They would give you an answer? A. Yes, sir.

Q. Did they tell you when they'd give you an answer? A. No, I asked him to give it to me early because I didn't want to meet with the men until I had some kind of an understanding as to whether it would be

acceptable or not.

Q. All right. But it was some later date? A. Yes, sir. Yes.

56 Q. He said he would let you know at some later date? A. Yes, sir.

Q. All right. Was that in substance all that transpired at that — that you remember? A. Yes, sir, I don't think the meeting lasted more than 45 minutes or an hour.

Q. All right. Now, then the next thing that happened, you received the Company's letter which is dated August the 8th? Is that correct? A. I received a letter. I believe that was the date.

Q. The letter was dated August the 8th, and do you remember when you received — A. We got the letter about, yeah, we got it on the 9th.

Q. You got it on the 9th —

TRIAL EXAMINER: May I see the letter? Go ahead.

Q. (By Mr. Palmer) All right. Now, what did you do in response to this letter? A. I called Dave Richards and explained the situation to him, and then we set up another meeting. I don't know whether that was by letter or by phone.

Q. All right. Do you recall whether you called the Company or the

57 Company called you? A. I don't recall.

Q. You do not remember? A. I do not remember. I'm of the opinion that I called them because —

TRIAL EXAMINER: Does it really matter, Counsel?

Q. (By Mr. Palmer) All right. The next meeting was August the 15th? A. Yes, sir.

Q. All right. Now, do you recall what happened during this meeting of August the 15th? A. Well, it seems to me we met — I know we met at the Travis Hotel. I tried to set down with them and see if we couldn't — I told Mr. Schoolfield I would like to work out — try and get busy and start and work out the contract, see if we couldn't get some kind of a settlement.

TRIAL EXAMINER: Did you discuss this letter of August the 8th?

THE WITNESS: Yes, sir.

Q. (By Mr. Palmer) What was said when you — with regard to the letter of August 8th? A. Well, I objected to that. I said, "We haven't had time to discuss that." That was the first offer we had had on wages, and I thought we should have some time to negotiate them, and I objected

58 to them, putting those rates into effect on the 17th of August.

Q. All right. And what did he say then? A. He said, "Well," — that was their position, and they were going to hold to it.

Q. All right. Now, do you recall anything else now that was said during this conversation? A. Yes, I asked him then if they would produce their records, their financial records, to give us some indication as to whether or not they couldn't — if they had to reduce wages in that amount. They said again that they were not pleading poverty, and they would not produce the records.

Q. All right. Were there any other items that were discussed at that time, at that meeting? A. It seems to me like I worked out, or told them we'd give them a proposal on seniority, which would give them more

flexibility in their operations. And I think I told them that I'd have a proposal for them at our next meeting. I also discussed the possibility of working out some sort of a rate range wherein they could — the people would start at a lower rate of pay and then they would graduate up until they would reach the top of the range. Of course they said they would be

59 interested in a range, but not in any range extended beyond the dollar and sixty cents maximum in the contract that they had put into effect.

TRIAL EXAMINER: Did you ever agree to reduce your own proposal of wages below that contained in the original proposal?

THE WITNESS: No, sir, not at that time.

TRIAL EXAMINER: You still stayed at that 25 cent raise — 25 cents an hour?

THE WITNESS: Yes, I agreed to extend the contract.

TRIAL EXAMINER: I'm not talking about that. I'm talking about the wage rates in the original proposal — you never agreed to reduce them at all?

THE WITNESS: We didn't have a chance to

TRIAL EXAMINER: I say you never agreed to? That's what I'm getting at.

THE WITNESS: That's right.

TRIAL EXAMINER: All right. And they never agreed to go above $1.60?

THE WITNESS: That's right.

TRIAL EXAMINER: And there you hung.

Q. (By Mr. Palmer) All right. Now, was there anything else now that you remember about the August 15th meeting that — was significant about — with regards to wage rates or matters that you discussed?

60 A. Gosh, I — I just can't pinpoint them.

Q. All right. Now, do you remember now at the close of the negotiation session, what was the situation, had you all agreed or disagreed, or what had you agreed to do, or what was the situation — well, did you agree to meet the next day on August the 16th? A. Yes, we agreed to meet the next day.

Q. All right. Now, do you remember the meeting on August the 16th? A. Yes, vaguely. Mr. Palmer, it's hard for me to remember each of these meetings and what transpired. I just don't remember.

TRIAL EXAMINER: Did you have your seniority proposal ready on the 16th?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Did you present it?

THE WITNESS: Yes, sir.

* * * * *

61 Q. (By Mr. Palmer) All right. Now, from your memory what happened then on August the 16th? A. Well now, he's — when we gave them — I know we did give it to them because Mr. Schoolfield said they believed that would help cure the problem as far as the assignment of work was concerned, and they had told us in the beginning and in several meetings

that that was one of the big problems that they were having, was the assignment of work, and using it by classifications and so forth and so on. They said that they then, when they had put this — when they had put this decrease in effect, they were also going to effect the change in the seniority provisions, and the rest of the contract would remain the same with the exception of the check-off, I believe, and the reates.

Q. All right. Now, this was the day before the rates were to go into effect, do you recall that? A. Yes, sir.

Q. All right. Did they state at that time that they were going to put the — make any indication that they were going to put the rates in effect? A. They said, "At midnight that night."

* * * * *

62 Q. All right. Now, do you remember whether you made any proposals or any suggestions with regard to that? A. Well, at that time then I think I proposed a 60-day extension of the contract with the old rates and let us to continue to negotiate and see if we couldn't effect a settlement. Again I said that if they could produce proof that if they couldn't afford these rates, we would be willing to take another look at it.

* * * * *

63 TRIAL EXAMINER: How did the meeting of the 16th break off, if you remember?

THE WITNESS: We broke up the meeting, and I think we told them we were ready to meet with them at any time; of course, when they put the wage rates or the wage cut into effect —

TRIAL EXAMINER: Well, we are talking about the 16th now. We haven't got over to the wage cut yet.

THE WITNESS: Yes, but what I'm trying to say is that I tried to work out something, and there was no work stoppage or anything. We tried to keep on working to see if we couldn't reach some sort of a settlement on the thing, and I think that's about the way it broke up.

TRIAL EXAMINER: Did you have an understanding at that time when you'd meet again?

THE WITNESS: No, I don't think we did.

MR. RICHARDS: I think part of this is contained in correspondence.

TRIAL EXAMINER: Yes, all right — it's already evident in my position, he's covered it in correspondence, including the position on financial information.

MR. PALMER: Right.

TRIAL EXAMINER: I see little difference between testimony and what's in Mr. Schoolfield's letter.

MR. RICHARDS: Very little difference.

* * * * *

64 Q. (By Mr. Palmer) All right. Now, were the rates put into effect the next day, the lower wage rates, on August the — were they actually put into effect? A. Yes, sir, they were.

Q. August the 17th, all right.

TRIAL EXAMINER: Were the remaining provisions of the contract kept into effect?

THE WITNESS: Not all of them, sir.

TRIAL EXAMINER: I think you mentioned before which ones were not, did you not?

THE WITNESS: I think it was the seniority clause, and of course, they didn't observe the check-off.

TRIAL EXAMINER: They had notified you they were not going to?

THE WITNESS: Yes, sir.

* * * * *

Q. (By Mr. Richards) Mr. Roseborough, you testified that on the 6th of August you asked for an extension of the contract with a 50 cent increase in health and welfare, I believe. Is that correct? A. Yes, sir,

65 50 cents a week.

Q. 50 cents a week per man, is that correct? A. Yes, sir.

Q. All right. How many employees were in the bargaining, if you recall, approximately? A. I believe 28 or 30. I think 28.

Q. All right, sir. Now, directing your attention to August 16th, you indicated that you proposed a 60-day extension of the old contract at that time. I believe that's correct? A. Yes, sir.

Q. Do you recall whether or not there was any mention made or you made any mention of the health and welfare when you made that proposal? A. No, I proposed to just extend the contract as it was for 60 days.

Q. Without increase in health and welfare? A. Yes, sir. Now, on August the 6th is when I proposed the 50 cent increase.

Q. All right. And on August the 16th the proposal did not include

the increase, is that right? A. Yes, sir, that's right.

66 Q. Directing your attention again to the 16th of — I believe you testified at that time the Union modified its seniority proposal, is that correct? A. Yes, sir.

* * * * *

Q. Was there a discussion of that by the parties at the bargaining table? A. Yes, there was.

Q. Do you recall at the — whether or not by the conclusion of the meeting of the 16th, the company had indicated that the Union modification of the seniority proposal was agreeable? A. They said that the modification of the seniority proposal was all right, but they were still going to go ahead and have a wage reduction, the same as before. There was one other modification, as I just happen to recall, on the management rights clause. I think we gave that to them on the 16th, I believe.

67 Q. Now, Mr. Roseborough, do you recall whether or not you made a proposal on the 16th with reference to establishing a rate range for the wages under contract? A. I do.

Q. Do you recall what your proposal was on that occasion with respect to the rate range? A. Well, it was rather general, but the men would start at a lower rate of pay, but the maximum would be the rate that was contained in the contract.

Q. Well, perhaps you had better explain that. What rates were presently contained in the contract? A. $2.00 and $2.15.

TRIAL EXAMINER: You mean new men would start at a lower rate?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: It didn't affect the amounts of increases that you were asking for the older ones?

THE WITNESS: Yes, it did.

TRIAL EXAMINER: How?

THE WITNESS: Sir?

TRIAL EXAMINER: How would it affect them?

THE WITNESS: Because then we had receded from our position at that time on the 25 cents per hour per year increase.

TRIAL EXAMINER: What had you receded to? I understood that you —

68 THE WITNESS: To elements being paid in the contract.

TRIAL EXAMINER: That was all for the 60-day extension?

THE WITNESS: That's right.

TRIAL EXAMINER: But except for the 60-day extension, you never came down from the —

MR. RICHARDS: Your Honor, I think I'm —

TRIAL EXAMINER: Just a moment. I questioned the witness about this once before, and he answered me on it. I'm trying to straighten it out.

MR. RICHARDS: I'm trying to straighten it out because I think you confused the witness on your examination before.

TRIAL EXAMINER: I didn't do it intentionally. I'm trying to clarify the issues here, and I understood him to say after his original proposal, he did not come down in his — the amount of wages he was asking — I'm not talking about the extension. That's a different matter.

MR. RICHARDS: I understand, but I think the record will reflect — correctly, that that's what his answer was.

TRIAL EXAMINER: Yes, all right.

MR. RICHARDS: I had the feeling that there was some confusion on the record that —

TRIAL EXAMINER: Well, if that isn't correct, you can straighten it out now.

MR. RICHARDS: That's what I was attempting to do.

* * * * *

69 Q. (By Mr. Richards)

* * * * *

On the 16th of August, Mr. Roseborough, you proposed a rate range as I understand it, is that correct? A. I asked the Company if we could work out something on the rate range.

Q. Now, I think you described it would mean that new employees would start below the current contract rate, I believe you said? A. That's right.

Q. And that the existing employees would remain at their present rate, is that correct? A. That's right.

Q. The question I have then, was this proposal made limited to the contract extension, or was it with respect to entering into a new contract? A. It was with the contract extension with the thought in mind — no, at that time I would have been willing to settle on that basis subject to the total of the men. Of course I advised the Company I had no authority to

go beyond what I had asked for, but that I thought we could probably work it out.

Q. With respect to simply an extension of the contract or with respect to a new contract? A. With respect to a new contract.

70 TRIAL EXAMINER: Did you suggest any rate you were interested in?

THE WITNESS: No, sir, I just mentioned the maximum.

MR. SCHOOLFIELD: I didn't understand that last —

THE WITNESS: The maximum. I only suggested the maximum.

Q. (By Mr. Richards) Meaning by maximum, the existing contractual rates? A. Right.

Q. Going back to the earlier contract discussions, I think you had testified rather fully to a meeting of August the 6th; as I understand it, you participated in a meeting July the 24th, July the 30th, and August the 1st, as I understand. Is that correct? A. Yes, sir.

Q. And without attempting to describe in detail what transpired at those meetings, did you and the Company discuss during those meetings the Company's counter-proposal for a contract? A. Actually we worked almost entirely from the Company's counter-proposal.

Q. And do I understand this counter-proposal contained numerous changes from the old contract? A. It did.

Q. I think you mentioned some of them, polygraph testing, changes

71 in probationary employees and so forth. Is that correct? A. Yes, sir.

Q. And is it correct to say that these changes occupied a substantial portion of your contract negotiation up to at least August the 6th? A. Yes, sir.

* * * * *

MR. RICHARDS: If I could have just one second, please.

Q. (By Mr. Richards) Mr. Roseborough, so that I am certain, do I understand correctly that the first Company wage proposal came in their letter of August the 8th? A. Yes, sir.

* * * * *

73 Q. (By Mr. Richards) The wage survey that was presented to you by Mr. Schoolfield, Mr. Roseborough, does not designate any employers or names of companies. Is that correct? A. No, sir.

Q. You testified, I think, in response to the Examiner's questions, that the Companies did not have a union contract? A. To my knowledge they don't have.

Q. And/or a contract with your Local at least? A. No, sir, I believe that's right.

Q. But do I understand correctly that the reason you know this is your Local doesn't have any other contract with commercial warehousing in Dallas. Is that correct? A. Yes, that's right.

* * * * *

76 CROSS EXAMINATION

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77 MR. RICHARDS: It is my proposed stipulation that the exhibit now

marked as Respondent's 1 was directed to Mr. W. D. White at Safeway Stores, Inc., by the charging party on the date indicated and that there was a letter of similar form or rather identical form directed to the managerial —

MR. SMITH: Managerial force at —

MR. RICHARDS: Well, let's say not the force but it was directed to the man in charge of all of the operations in this area.

TRIAL EXAMINER: On what date?

MR. RICHARDS: On or about the same date.

MR. SMITH: It shows the date of October the 9th.

TRIAL EXAMINER: Is the stipulation acceptable?

MR. SMITH: Yes, sir, I want to, with certain additions.

TRIAL EXAMINER: Well, the stipulation up to this point is —

MR. SMITH: Up to this point it is unaccepted, and further on the

78 stipulation that this the only letter of — accept the stipulation on the Union's statement that this is the only letter directed to Safeway and A&P.

MR. RICHARDS: That's my understanding, it's the only written communication about this subject directed to A&P and Safeway.

TRIAL EXAMINER: Is that acceptable?

MR. SMITH: Yes, sir.

TRIAL EXAMINER: The stipulation is received.

* * * * *

80 Q. (By Mr. Smith) Now, Mr. Roseborough, early in the bargaining

session didn't you make the statement that the union would not bargain down, but always bargain up? A. Not only in that meeting did I make it but I make that in every session that we have ever had.

Q. All right, sir, didn't you take the position in the earlier sessions that you would not agree to any contract that did not provide for a wage increase? A. I may have said that.

* * * * *

Q. All right, sir. Had there been any indication that he was seeking a wage reduction? A. Yes, there was.

Q. Since when, since the first bargaining session was or the first one you attended? A. I'm not sure. I could have been, yes.

* * * * *

81 Q. All right, sir. During the early bargaining sessions when Mr. Schoolfield was stating that they were looking for a wage decrease, he used an example as to why they wanted a wage decrease; do you recall that?

Let me make specific reference to gasoline. A. Well, he may have said it. I don't recall. He probably did.

Q. Didn't he point out to you that he was paying on July the 24th — that the Respondent, Empire Terminal Warehouse, was paying fifty to thirty-five cents an hour more than his competitors were paying? A. Yes.

Q. All right, sir. And didn't he say to you that there was no point in the company, speaking of Empire Terminal, buying gasoline at one corner for fifty cents a gallon if he could buy it at another corner for twenty-five cents a gallon? A. I don't remember that, he very possibly

did say it.

Q. All right, sir. A. Those things we expect at the negotiations.

Q. He was taking the position, was he not, Mr. Roseborough, that the company was paying more for the wage commodity than its competitors were? A. Yes, he was.

82 Q. All right. Let me refer you specifically to the meeting of August the 6th at which time Mr. Schoolfield delivered to you a wage survey, in evidence as General Counsel's Exhibit 8. He handed that document to you, did he not? A. Yes, he did.

Q. And you said that you were not interested because you were bargaining for Empire Terminal Warehouse? A. That's right.

Q. All right, sir. Did you question the accuracy of those figures? A. Yes.

Q. In that same session? A. Yes. But I didn't question the accuracy I said "How do I know where these warehouses are, how do I know who they are." I know nothing about Company A, Company B, Company C and so forth.

Q. Didn't — A. I didn't know anything about the wages being paid except that I was reasonably sure that they were lower than ours.

Q. All right, sir. You knew the competitor's wages were lower than Empire Terminals? A. Yes, I had reason to believe they were. I wasn't positive.

83 TRIAL EXAMINER: Did he tell you where those companies were located?

THE WITNESS: He said in Dallas and one in Houston.

Q. (By Mr. Smith) All but one of them was in Dallas? A. Yes, sir.

Q. Didn't Mr. Schoolfield offer to put the names of the companies with a disinterested individual so that you could check the accuracy if you wanted to, so that you wouldn't have the names of the companies but the accuracy could be checked against the wages set forth through a third party? A. That was on August the 6th.

* * * * *

Q. You did say that you weren't interested in the rates that other companies were paying? A. I did.

* * * * *

85 Q. (By Mr. Smith) The next meeting was September the 24th and you attended that meeting. A. Well, I attended the meeting, Mr. Smith, I don't remember the date.

* * * * *

86 Q. Yes, sir, will you explain why there was such a delay between August the 16th, 1962, at bargaining sessions prior to the strike and the next meeting of September the 24th after the strike? A. Gosh, I don't know — I don't have any idea.

Q. All right. Do you know Mr. Charles Steere? A. Yes.

Q. As a Field Examiner with the National Labor Relations Board? A. Yes, I do.

Q. His office is in Fort Worth? A. Yes.

Q. All right. He took a statement from you in the investigation of these charges, did he not? A. Yes.

Q. Didn't you tell him while he was taking these statements or in a conversation that the reason you did not meet between August the 16th, 1962 and September the 24th, 1962 was because you did not believe the

87 company would put into effect what it said it was going to do?

A. I said this, to go back just a little bit — we had had excellent relations with this company for a period of six years over two contract spans. Throughout this time they had called us about problems and we had gone with them and tried to work them out. We had problems, they were very cooperative in working them out with us, I just couldn't make myself believe that they were sincere in reducing wages, especially right at contract time.

TRIAL EXAMINER: Is that what you told Steere? That's what you are being asked.

THE WITNESS: I don't remember what I told him.

Q. (By Mr. Smith) Did you indicate that to Mr. Steere that was the reason because you didn't think they would put that into effect? A. I made that statement to Mr. Steere, probably.

* * * * *

91 DAVID R. RICHARDS

was called as witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Palmer) Will you state your name, please? A. David R. Richards.

Q. And what is your occupation? A. I am an attorney in Dallas County.

Q. All right. Now, you represented the charging party here in filing this charge and in some of the negotiation sessions, is that correct? A. That's correct, I think the first negotiating session I participated in was August 16, 1962. I participated, I think, in all the negotiations thereafter.

* * * * *

93 Q. (By Mr. Palmer) Now, at any later time or any other time while you attended bargaining sessions was there any discussion of contracting out work? A. Yes, there was and I identified either the 24th or the 27th of September, that's my recollection that it was discussed rather extensively after the strike at one of the negotiation meetings.

Q. All right. Now, do you know the date the strike commenced? A. September the 10th, 1962.

Q. September the 19th. All right. Now, what was the conversation with regards to contracting out work? A. My best recollection is that at

94 one of the post-strike meetings we were discussing the management rights clause as proposed by the company and the union agreed to draft a counter proposal on management rights to be presented at the next meeting. This draft was prepared and presented at the next meeting and it dealt with in part the employer's right to contract out work or subcontract out work.

Q. All right. Now, what was — what did it provide? A. I think the —

my best recollection is that there is a document that carries it forward, that there was an understanding that in the limited area that had been subcontracted out before the strike — let me digress here a moment. It is my understanding that at least during the — under the old contract there had been a limited amount, a limited amount of contracting out of local cartage work.

My recollection is that, of course, this was a proposal it's part of a package of contract, but that we agreed upon a proposal that provided that in an area where subcontracting had been done during — under the old contract that this could be continued if — whenever a new contract was signed. In effect this proposal specifically incorporated this past practice was agreed to.

Q. All right. A. As part of the practice — entire contract.

95 Q. Now, was there any discussion of the contracting out of work?

A. The specific emphasis of it, you mean?

Q. Yes. A. Yes, there was some admission of what they had done in the past.

Q. All right. Now, what was it that had been done in the past?

A. I can only try to recall what was actually said at the bargaining table.

My recollection is that there was some discussion of the company picking up casuals to do some unloading work. This, I think my recollection is, we agreed that they would not do this kind of work, they wouldn't pick up casuals to do unloading work. There was a discussion of local cartage that had in the past in some instances been contracting out or subcontracting to the local cartage companies and I do not recall any specific

instances, you know, like we used to do here, I don't recall it if there was a discussion.

* * * * *

96 Q. All right. Now, has there been any other bargaining sessions that you have discussed the bargaining — the contracting out of work?

97 A. Yes. There has.

Q. When was the last? A. There was a letter from the Union to the Employer in one of the exhibits protesting the contracting out of bargaining work. I think it was sometime in December, there was a response to the letter from Mr. Schoolfield and then —

MR. SMITH: General Counsel's Exhibit 22.

THE WITNESS: Then later there was a letter from Mr. Schoolfield requesting a bargaining session with respect to contracting out work. That is the letter, Exhibit 22, protesting the contracting out of work. It was responded to by letter dated December the 20th, thereafter came a subsequent letter from Mr. Schoolfield requesting a bargaining session I assume this came sometime around the 1st of March.

We held a bargaining session on or about March 12, 1963, I'm not sure about my date, fairly recently at which this matter was discussed — so the answer is yes, there was a bargaining session.

Q. (By Mr. Palmer) What was the discussion at that time?

A. The Union made it known really in keeping with its letter of December the 17th that it was protesting what we felt to be contracting out of bargaining unit work to local cartage companies. I don't recall the entire

eiscussion. I recall that Mr. Schoolfield, I think it was he, said there had been a certain amount of contracting out of work that was continuing to

98 date specifically the local cartage deliveries from the Empire Terminal Warehouses to A&P and Safeway store operations in Dallas.

He said that this was being done by English Cartage Company, I think that my recollection is that I said — I don't like to use the word accused I asserted that this had been done, this contracting out had been done without any notice to the union of any kind and my recollection is that he agreed that it had been done without notice to the union.

I think there was further agreement that, during the term of the contract that this work had always been done by persons in the bargaining unit at least to the extent that it came from the main warehouse on Austin Street. I think the company, as I recall had been — this had been the past practice. I'm sure Mr. Schoolfield is going to develop his defense to the specific time is the reason the company didn't undertake it was because — it was necessitated by strike and by certain correspondence or communications from the union to A&P and Safeway.

I think, if I recall correctly, Mr. Schoolfield advised us as — effective immediately that they were going to discontinue this particular form of contract.

TRIAL EXAMINER: When was that he told you that?

THE WITNESS: On March 12, 1963 — let me say one thing further,

99 this was the first occasion that at least after August the 16th that there had been any discussion with this specific problem in bargaining

sessions — the farming the work out to English with respect to A&P and Safeway.

* * * * *

Q. Now, taking it back to August the 16th — the meeting on August the 16th do you recall the conversations that were carried on between the Union and the Employer about the wages on the 16th? A. Well, I guess there were several conversations, I mean — obviously part of the entire discussion. I remember certain things that took place on the 16th, yes.

100 Q. All right. A. I recall specifically an inquiry I suspect from Mr. Roseborough directed to the company whether or not their intentions to put a dollar sixty wage into effect was still their intention, and the answer that it was. I recall specifically that I think Mr. Schoolfield at this point reiterated what I understand he had said in previous negotiations about their being worried about their competitive position.

Still, at the same time, they were not pleading inability to pay. There was a request again for books and records, my recollection is Mr. Schoolfield responded that we're not pleading inability to pay and will not produce the financial records. Roseborough proposed and I can't place the proper context, but it was midway in the meeting at least — let me back off. I think the first thing that was said there was a request again for — or there was a request by Roseborough for extension of the existing agreement with rates of pay unchanged. I don't remember. I think it was for sixty days, it may have been for another period, the company did not want to agree to this. Later in the negotiations I recall Mr.

Roseborough saying would the company consider a proposal to institute a rate range taking the top of the rate at the existing contract rates which were two and two fifteen for respective classifications, and establishing a lower or starting rate for new employees that was lower than the existing

101 contract rate.

My recollection to that is that Mr. Schoolfield replied that the only rate range they were interested in they wanted it pegged at a dollar sixty per hour with respect to wages. I think that's all I recall — I do recall another Mr. Schoolfield said at this point or at least at another point where we were discussing a possibility of extension. He said "The company wants to go ahead and put their wage decrease — we'll go ahead and put their wage decrease in effect and perhaps in following subsequent negotiations perhaps we can work the matter of wages out or we can make some agreement on the matter of wages." That's all I recall on wages at this point.

Q. All right. Now, in subsequent meetings were efforts made to work out the wage rates. A. I don't recall there was a strike settlement proposal made sometime in October it's in the exhibits here. It has a wage rate in it. I don't know —

TRIAL EXAMINER: You mean a proposal to the Union?

THE WITNESS: Yes, I'm sorry. It was the Union. There was no proposal from the company since then. The Union made a proposal on October the 12th, I believe you have it in your exhibits, as to contain a wage proposition.

MR. SCHOOLFIELD: GC-21.

THE WITNESS: This was after the strike.

102 Q. (By Mr. Palmer) Now, what was the Union's reaction to this strike proposal?

TRIAL EXAMINER: The Union's reaction?

Q. (By Mr. Palmer) I mean the Employer's reaction. A. They rejected it.

* * * * *

CROSS EXAMINATION

Q. (By Mr. Schoolfield) Mr. Richards, I'll hand you a document which I have marked for the record for identification as Respondent's Exhibit 2 and ask you if you recognize that document?

(The document above-referred to was marked Respondent's Exhibit No. 2 for identification.)

TRIAL EXAMINER: Can you answer?

THE WITNESS: Yes, sir, that appears to be the document about which I testified regarding the management rights clasue and the sub-contract positions — I guess that is the document.

Q. (By Mr. Schoolfield) Then it's your testimony that that was agreed upon subject to complete contract negotiations? A. That's my recollection — as I say I qualify myself as to the date I'm not certain of the date, but my recollection is —

Q. You testified it was either on September the 24th or September

103 27th. A. That's right, and I may still be wrong on that. I know it

was after the strike.

Q. You will notice that the document has at its bottom, approved A.P.S., Jr., 9-27 of '62. You have no quarrel with this? A. That's in accordance with my recollection.

TRIAL EXAMINER: Who made the proposal? You or the Company?

THE WITNESS: The Union — I drafted, I think, the management rights provision that appears in typing. We discussed the language as it appears in pencil and this was added to it as I recall after we presented the typewritten proposal.

Q. (By Mr. Schoolfield) Then you recognize the document? A. I sure do.

* * * * *

106 Q. (By Mr. Schoolfield) Mr. Richards, on the meeting of August the 16th, 1962, is it not true that the Company's position on the wage — present wage scale was that the wages were high and didn't give the company what they wanted out of their business. Was that the company's position? A. If you're asking me what — my recollection is at one point in the meeting of the 16th this was stated by the Company, yes.

Q. What was stated, do you remember? A. Pretty close to what you said. The existing wage scale didn't give them what they wanted out of their business, something along those lines.

Q. All right. Now, at the close of the meeting did you ask the company whether or not they wanted another meeting, do you remember? A. My recollection of the close of the meeting, is that what you want?

Q. Yes, what was your recollection at the close of the meeting?

A. I think, both parties, I think, we did — the unit did say do you want another meeting or do you want to set another meeting, and the company indicated they did not but they were happy to meet at any time.

107

My recollection is that the union made quite similar statements that they were not prepared at this point to set the date for a new meeting but would be available upon request and I think we left that — either party, I mean would call or contact the other.

TRIAL EXAMINER: When the spirit moved them?

THE WITNESS: When the spirit moved them, yes.

Q. (By Mr. Schoolfield) Now, there was no written wage proposals given by the Union to the Company on August the 16th, was there? A. Not — you mean the actual exchange in writing?

Q. Yes. A. No, not that I recall. I'm sure there wasn't.

Q. And no amounts were mentioned for any stairstep or escalator scale? A. No, I think my testimony was correctly that the statement was made — I used the word pegging, I'm not sure that's right but fixing the top rate at the existing contract rate and a lower starting rate but — no, I don't recall, it was obviously lower than two dollars but I don't recall. There was no specific figure given.

TRIAL EXAMINER: But you did object to the Company's one sixty as the bottom?

108

THE WITNESS: Yes.

TRIAL EXAMINER: Well, that was lower than two dollars.

THE WITNESS: Yes, substantially and did object, of course, to their putting it into effect, the wage and decrease.

* * * * *

111 REDIRECT EXAMINATION

Q. (By Mr. Palmer) You are the same Mr. Wakefield who testified earlier this morning and was sworn in at that time? A. Yes, sir.

Q. All right. Were there any strike votes taken by the Union? A. Yes, sir.

* * * * *

Q. (By Mr. Palmer) Do you recall whether there was more than one strike vote? A. Yes, sir, there was two.

112 Q. There was two, all right.

Do you remember when the first one was taken? A. I believe it was along about August the 13th, I believe.

Q. About August the 13th? A. Yes, sir, I'm not positive of that date.

Q. Was it after the receipt of the company letter that they proposed to decrease the wages? A. Yes.

* * * * *

Q. All right. Now, will you tell what happened at this meeting? A. We called these employees into a meeting and explained to them what we had done at this time, and what had been done. Of course, that wasn't the first meeting but this was the meeting of the 13th, I believe it was — what had been done and what had been the negotiations up to this point. We read the letter to the people, the employees and the Union members

113 that was received on September the 9th from Mr. Allen P. Schoolfield saying that he was going to reduce the wages down to a dollar sixty cents an hour or sixty-five whichever it was.

* * * * *

THE WITNESS: I read the letter we received from Mr. Schoolfield on September the 9th — I mean August the 9th.

Q. (By Mr. Palmer) August the 9th. A. Explained to them by that letter that their wages was going to be cut, the 17th of August their wages would be cut, and we took action.

Q. All right. Was there anything else discussed there in connection with the bargaining sessions? A. Yes, sir.

Q. What particularly was discussed? A. We explained to them what we had done and what had been, how many meetings we had had, where we had got to at the point and we were more or less at a standstill. It looked like it could go either way and the company would not agree it didn't look like to another contract. We were just having trouble in negotiations.

* * * * *

114 Q. O.K. Now, what was the result of this vote? A. They took, at that time, a vote was taken. They took a vote to strike if the company cut their wages from two fifteen and two dollars down to one sixty-five. They took a vote to strike and that I would call them back into another meeting and set the date and the time for the strike, if their wages was cut.

Q. All right. Now, when was the date of the second meeting?

A. September the 5th.

Q. September the 5th? A. Yes.

Q. All right. What transpired at that meeting? A. At that meeting Mr. Piland and myself attended this meeting along with all of the employees. We explained to them that our lawyer, felt, due to the fact that the company had went ahead and cut their wages, because they had drawn

115 some pay checks in the meantime, that the company had went ahead and cut their wages forty cents to forty-five cents an hour down.

We felt at that time it had become an unfair labor strike — practice and we felt that we was going to have to strike the company in order to get back what they had in the old contract. That was the best that we were going to be able to do.

Q. What did the men do? A. The vote was taken and the motion was made and seconded by the people. It was unanimous vote to strike the company the 10th day of September.

* * * * *

118 TRIAL EXAMINER: Was the company's letter — what was it, August the 8th?

MR. PALMER: August the 8th.

MR. SMITH: Yes.

TRIAL EXAMINER: Was that the first wage proposal that the company had made?

MR. SMITH: That was the first proposal that the company had made in absolute terms of dollars and cents. There was testimony that the

Union was aware that the company was seeking a wage decrease, and was trying to get a wage decrease.

We had constantly asked the Union for wage proposals short of the dollar twenty-five — short of the twenty-five cent across the board increase. They had not come across with a specific wage proposal, on the meeting of August the 6th they asked for a wage proposal. The company responded on the letter of August the 8th, setting forth its proposal and setting forth that we intended to put those into effect unless they could come forward with some counterproposal which would solve the dilemma.

* * * * *

137 RICHARD A. WILLIAMS,

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Smith) Will you state your full name, and address for the record, please? A. Richard A. Williams — home or business address?

* * * * *

138 Q. By whom are you employed, Mr. Williams? A. Empire Terminal Warehouse.

Q. In what capacity? A. General manager.

* * * * *

141 Q. All right. Now, Mr. Williams, was A&P Grocery Store a customer of Empire Terminal Warehouse? A. Yes, we delivered to those people or they picked up.

Q. All right. And deliveries to A&P warehouse — who made those

deliveries prior to the strike? A. We did.

142 Q. Who made pickups from the Austin Street terminal prior to the strike? A. For A&P?

Q. Yes, sir. A. I think they had a cartage company named Cathey & Carrell.

Q. You did not make deliveries to them where — well, explain that why they would pickup? A. Well, there is two ways of buying grocery products, F.O.B. their dock, F.O.B. our dock. It would depend on whether they would want to come over — if it was an item that was F.O.B. our dock, then they would send their truck over to pick up. If it was F.O.B. their dock, then, we would send ours.

* * * * *

143 Q. After the strike — in around October of 1962 was there any change in your method of delivery to the A&P warehouse? A. Yes.

Q. How, what was that change? A. The change was, we had the merchandise which was to be delivered to them — was delivered through English, English Cartage.

Q. Why was that? A. A&P requested that we not send our own equipment in.

Q. Did they make that request to you? A. On the telephone, yes.

Q. All right, you did not send your equipment in? A. Right.

Q. Did you make arrangements with them as how you would send it in? A. Yes.

Q. What was that arrangement? A. We would use a cartage company.

Q. What cartage company did you use? A. English.

Q. All right. Now, what about pickups that A&P would make through their cartage company, Cathey & Carrell, what happened to those pickups?

144 A. Those pickups were converted to boxcars, we loaded out boxcars.

Q. Did they — did A&P not send their truck in to pick up? A. That's right, they did not send them in.

Q. And what would they request you to do as far as their pickups were concerned? A. Put them in a boxcar.

Q. Are you talking about a rail freight? A. A freight car, yes.

Q. All right, and what would you do with the rail car? A. Load it, put a seal on it and send it to A&P.

Q. All right. Now, with respect to pickups that Cathey & Carrell would make, who would load the trucks? A. They would load their own.

Q. They would load their own? A. We fed it to the back of the truck, we stacked it off.

TRIAL EXAMINER: Cathey & Carrell, who are they?

MR. SMITH: Would you explain?

THE WITNESS: That is a cartage company that A&P use to do their pickup work.

TRIAL EXAMINER: I see, yours was —

Q. (By Mr. Smith) English — now, your employees formerly loaded your own deliveries to A&P, is that right, onto the truck? A. Yes.

* * * * *

149 TRIAL EXAMINER: Do you still have English making deliveries to A&P?

THE WITNESS: No, sir.

TRIAL EXAMINER: When did you stop?

THE WITNESS: A week ago Friday following the meeting with the Union on about the first of — about three weeks ago when we had a meeting.

TRIAL EXAMINER: Did you stop using English to make deliveries to Safeway at the same time?

THE WITNESS: Yes.

Q. (By Mr. Smith) You are now using your own trucks to make deliveries to both Safeway and A&P? A. Right.

* * * * *

202 MR. SCHOOLFIELD: I would like to solicit the stipulation that the Teamsters Union, Local 745, has warehouse contracts at A&P and at Safeway warehouses. Is that a true statement or do you want me to call one of these people and ask?

MR. RICHARDS: We have, Teamsters Local Union 745 has contracts with — representing some of the employees and some warehouse employees at A&P and Safeway.

MR. SCHOOLFIELD: Can you stipulate to that?

203 MR. RICHARDS: To my statement.

MR. SCHOOLFIELD: Fine.

MR. PALMER: I join in the stipulation.

* * * * *

GUY M. NEEL

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Smith) Mr. Neel, will you state your full name and address for the record, please? A. Guy M. Neel; that's N-e-e-l, 1022 Erin Drive, Dallas 18, Texas.

* * * * *

204 Q. All right. Have you been employed by A&P Grocery Stores?

A. Yes, sir.

Q. From when to when? A. From May the 5th, 1928, until March the 14th, 1963.

Q. All right, sir. During the past year or the year prior to your leaving A&P what was your capacity — what was your job? A. I was operating superintendent.

Q. All right. Did you work at the A&P warehouse? A. Yes, sir.

Q. All right, sir. I'd like to show you an exhibit, Respondent's Exhibit 1, this is a letter dated October 9, 1962; it is addressed to W. D. White, Safeway Stores, Inc.; I'll ask you if you received a letter similar to that or if one came to your attention similar to that? A. I received a letter similar to this. I couldn't say whether it was word for word or not.

* * * * *

213 Room 233, Southland Hotel,
Dallas, Texas,
Thursday, March 28, 1963.

The above-entitled matter came on for hearing, pursuant to adjournment, at 9:30 o'clock, a.m.

* * * * *

226 C. M. ROSEBOROUGH

was called as a witness by an on behalf of the Respondent and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Schoolfield) Mr. Roseborough, did you attend a meeting with myself and Mr. Dick Williams on March 12, 1963, a session in which problems of Empire Terminal were discussed? A. Yes.

Q. And that was a stipulated bargaining session of March 12, 1963. Is that not right?

TRIAL EXAMINER: Well, the record shows that. The record shows that it was one of the stipulated bargaining sessions.

MR. SCHOOLFIELD: Fine.

Q. (By Mr. Schoolfield) Now, Mr. Roseborough, did you make a statement in reference, or ask the negotiators of the company if they would consider a proposition from your people? A. Yes.

227 Q. What was that, please, sir? Would you tell the Examiner?

A. I said, "I," — I couldn't see why we couldn't get together and work out some kind of an agreement, "I'd like to go through the contract and try to work it out."

Q. Fine, sir. Did you say anything else about — if your people would take less money or that you wanted to go back to your people?

A. At that session?

Q. Yes, sir.

MR. RICHARDS: Excuse me a second. You are referring to March of 1963; is that right?

Q. (By Mr. Schoolfield) Of 1963. A. Yes, I remember the meeting in the Travis Hotel.

Q. Do you remember the close of the meeting just before you left the meeting? A. I remember saying this, Allen, that I said, "Allen, I don't see why we can't sit down and work this thing out and get a settlement and get these people back to work." I don't remember whether I said that we'd made an offer of less money or not. I didn't have the authority to. All I had the authority to do was to recommend. I couldn't — I had no authority to.

228 Q. Did you state you'd go to your people to see if you could get their authority? A. I said that if you could get — if you could set down and work an agreement that I would go back to them, yes.

Q. Have you been back to your people? A. No.

Q. You have not? A. No.

* * * * *

232 JACK S. HUNTINGTON

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Schoolfield). Mr. Huntington, will you give your name and address for the record, please? A. Jack S. Huntington, 9033 Longmont, Dallas, Texas.

233 Q. Mr. Huntington, have you ever been employed by Empire Terminal Warehouse? A. Yes, sir.

Q. Can you give us roughly the term of your employment there? A. From January the 1st or January the 2nd, 1956, until the last of October, 1962.

Q. What was your position during the past two or three years with Empire Terminal Warehouse? A. Executive Vice President.

Q. Did you attend bargaining sessions that are stipulated in this record, commencing in July through August and September and to October of 1962? A. I did.

Q. And you attended with the attorneys in question? A. That's correct.

Q. As well as other parties? A. Right.

Q. Now, in the meeting of July 25, July 30 and August 1, and August 6th —

MR. PALMER: July the 24th.

Q. (By Mr. Schoolfield) Would you state briefly the position of the company on wages?

MR. RICHARDS: Objection. This is improper. The witness can't characterize. I think he can testify what was stated at the bargaining

234 sessions.

TRIAL EXAMINER: You may ask him if the company stated a position on wages.

Q. (By Mr. Schoolfield) Did the company state a postion on wages

during those bargaining sessions? A. The company stated that it could see no reason why it should pay more than its competitors were paying. The example, if you could buy a truck for $4,000.00, you wouldn't go to another and buy the same truck for $4,000.00; or you wouldn't buy a gallon of gasoline for 35 cents a gallon if you could buy it for 25 cents a gallon.

* * * * *

TRIAL EXAMINER: You stated four and four twice, Mr. Witness.

THE WITNESS: I'm sorry. I meant if you could buy a truck for $4,000.00 from this dealer, you certainly wouldn't go to another dealer and pay $5,000.00 for it.

* * * * *

235 Q. (By Mr. Schoolfield) And what position of the company was that related to; what was discussed at the time? A. The discussion at the time was over wages.

TRIAL EXAMINER: What was the first meeting in which the company stated a position on wages, first meeting you attended?

THE WITNESS: On July the 24th.

TRIAL EXAMINER: What position was stated on wages at that time?

THE WITNESS: It was stated at that time that we were paying from 35 to 50 cents per hour more than our competitors.

TRIAL EXAMINER: Well, did you state whether you were willing to continue doing that or not?

THE WITNESS: Sir?

TRIAL EXAMINER: Did you state whether you were willing to continue doing that or not?

THE WITNESS: Doing what?

TRIAL EXAMINER: Paying 25 to 50 cents more than your competitors. You made the statement that you were doing it. You may have been willing to do it as far as I know.

THE WITNESS: We stated we were not willing to continue to do that.

236 Q. (By Mr. Schoolfield) All right, sir. Are you through, Mr. Examiner?

What was the position the company took on July the 30th? A. The same.

Q. In reference to wages? A. The same.

Q. Now, let's go back to — that was the position the company took? A. That was the position the company took.

Q. Now, let's go back to the meeting of July 24. What was the position the union took on wages on July the 24th? A. The position the union took is that they would not sign a contract without wage benefits to their membership.

Q. Would you give the Examiner the position the union took on July the 30th with reference to wages? A. July the 30th they again stated they would not negotiate a contract without wage benefits and some health and welfare benefits as well.

Q. Do you recall the meeting of August the 6th, 1962? A. Yes, sir.

Q. Where was that meeting held? A. In the Federal Mediation,

Mr. Ted Morrow's office.

Q. Would you state the union's postion in reference to wages on that

237 date? A. The union's position that day was that they wanted 50 cents per week health and welfare benefits, and that they would hold a meeting with their membership to see if they would come off of the 25 cent per hour that they had requested before.

TRIAL EXAMINER: 25 cent an hour increase?

THE WITNESS: Yes, sir.

* * * * *

Q. All right, sir. Now, do you recognize General Counsel's Exhibit No. 8? A. I do.

Q. Would you tell us the circumstances under which you saw that

238 exhibit on that date? A. On that date you told Mr. Roseborough that we had a wage survey of what our competitors were paying in our area. They were not organized warehouses. You had this list prepared showing A Company, B Company, C, D and so forth, and offered to give this list to Mr. Morrow with the names of A, B, and C Companies for verification of the facts of the hourly wages being paid by our competitors.

Q. Did I hand that list to Mr. Roseborough? A. You did.

Q. What did he say? A. He said he wasn't interested in what our competitors were paying; he was there to negotiate a contract with wage benefits for his membership. They said, "I might use it some other time," so you gave it to him; and he said, "You didn't sign it, Allen." So he gave it back to you and you said, "I'll sign it if you want me to," and you signed

it and gave it to him.

* * * * *

Q. (By Mr. Schoolfield) Now, Mr. Huntington, do you recall a meeting of October the 12th, 1962? A. Yes, sir.

239

Q. Where was that meeting held? A. In the Travis Hotel, was in one of the club rooms on the main floor, Kiwanis Room or something.

Q. Who was present at that meeting? A. Mr. Allen Schoolfield, myself, Mr. Roseborough, Mr. Dave Richards, Mr. H. M. Wakefield, Shop Steward Gideon Thomas.

Q. Now, I'll hand you General Counsel's Exhibit — I hand you General Counsel's Exhibit No. 21 and ask you if you can recognize that exhibit, where did you see that first? A. At that meeting.

Q. And what are the circumstances surrounding that exhibit? A. The circumstances surrounding it, they presented this document to us that morning at the meeting for settlement of the strike.

Q. And what was the answer of the company to that? A. The answer of the company was to that — no.

Q. All right. What else was said at that meeting? A. At that time the union stated that —

Q. Speaking through who? A. Mr. Roseborough, — that up to this point it had been a quiet picket line just roaming back and forth in front of the warehouse, and that although they hesitated to do so, they would

240

use every means within their power to break the company if that was necessary.

* * * * *

Q. (By Mr. Schoolfield) Now, do you recall how the meeting broke up or ended? What was said at that time? A. Right after that statement he said, "Fellows, I think we're wasting —

Q. Who is he? A. Mr. Roseborough, he said, "Gentlemen, I think we're wasting our time talking to them. Let's go to the barn."

* * * * *

Q. (By Mr. Schoolfield) Go to the barn? A. Go to the barn, that's just a phrase.

Q. All right. A. He turned to Mr. Richards and said, "Is that agreeable with you?" And Mr. Richards turned to Mr. Wakefield and said, "Is that agreeable with you," and turned to Gideon Thomas and they all agreed; and with that they said, "If you come up with anything further, contact us." And Mr. Schoolfield in turn said, "We'd be glad to talk to you at any time you contact us."

241 Q. Was there any mention of changing position at that time when the meeting broke up? A. No.

* * * * *

246 Q. Would you tell the Examiner how long it was before you had a full component force after the strike? A. We had a full force on the following Wednesday, two days later; that would be September the 12th.

TRIAL EXAMINER: The strike was on Monday?

THE WITNESS: The strike was on Monday morning, and Wednesday morning we had replaced all the men.

* * * * *

248 CROSS EXAMINATION

* * * * *

257 Q. Now, reverting again, Mr. Huntington, briefly to your testimony a minute ago about the course of negotiations and the various suggestions of changes of contract, for example one of them is the elimination of the check-off, is it not? The company proposed the elimination of the check-off provision in the old agreement? A. We omitted that from the original proposal, but told you during the negotiations that you could consider that as being in the contract.

Q. My point is that this is the area in which some time before the strike, we reached agreement on. Is that correct? A. Right.

Q. And that is but an example of — there were other areas where agreement was reached on these non-economic factors during the course of negotiations? Is that correct? A. Correct.

Q. Did you prepare the wage survey yourself, Mr. Huntington? A. No, sir, I did not.

258 Q. Mr. Schoolfield did it for you? A. Yes, sir.

Q. Do you recall when it was completed? A. Well, I can't say how many days, but on — wait a minute. Let me see.

TRIAL EXAMINER: Can you answer?

THE WITNESS: Not exactly when he completed it, but I know it was before that time.

TRIAL EXAMINER: And did you have a copy yourself? When did you first see it?

THE WITNESS: Mr. Schoolfield told me of it prior to that time, but that was the first time I received that.

TRIAL EXAMINER: On August the 6th?

THE WITNESS: Copy that he presented to them.

TRIAL EXAMINER: On August the 6th?

THE WITNESS: On August the 6th.

TRIAL EXAMINER: And prior to August 1st, do you know whether he had completed it by that time?

THE WITNESS: I don't — he didn't have it typed, but he had the information and had given it to me over the phone prior to that.

TRIAL EXAMINER: By August the 1st?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: And it hadn't been typed up?

THE WITNESS: No.

259 TRIAL EXAMINER: All right, sir.

Q. (By Mr. Richards) To be sure I understand from your testimony, I take it you testified that there were extended discussions in the pre-strike negotiations about the entire contract proposal that we discussed; as you say, the check-off, the polygraph was one, and it went on for extended discussion, did it not? A. Yes, but all during those discussions, they kept coming up with the same thing, that they were not going to negotiate a contract without a wage increase.

Q. I understand, but your answer to my question was yes. Is that correct? The matter of the polygraph occupied a substantial portion of the

negotiations? A. Several matters occupied some debate.

Q. I guess, Mr. Huntington, actually before you saw Mr. Schoolfield's wage survey, you had a pretty good idea what it would reflect; did you not? A. We knew generally what our competitors were paying.

Q. And you were faced with the prospect of losing accounts to competitors who were underbidding you? Is that correct? A. We did, and we didn't obtain business that was new and available because they bid below us.

Q. And this was the problem that confronted the company? A. Yes.

* * * * *

265 RICHARD WILLIAMS

was recalled as a witness by and on behalf of the Respondent and, having been previously sworn, was examined and testified as follows:

REDIRECT EXAMINATION

* * * * *

267 Q. (By Mr. Smith) Now, Mr. Williams, were you in attendance at

268 a bargaining session of March the 12th, 1963? A. Yes.

Q. All right, sir. What was that meeting about? A. It was about subcontracting.

* * * * *

Q. (By Mr. Smith) What was said at that meeting, Mr. Williams? A. Subcontracting was discussed, and at that meeting, toward the end of it, we had a little descussion back and forth, and toward the end of it, Mr. Schoolfield asked if we thought it would be all right. He asked Mr. Roseborough and Mr. Richards if it was all right if he went back into

Safeway and A&P with our trucks, and that they indicated yes, it would be all right, so he asked me if he could, how soon could we do it, and I said, "Probably the next day or the day following." It would take us so long to

269 get geared back, but that would be all. So I think he asked him again if it would be agreeable to him, and I believe they nodded agreement so we have since put it back in effect.

Q. Did you advise, or anyone advise the people present that you were going to go back to making your own deliveries? A. Yes, Allen asked me if we could, and I said yes, we could; it would just take about a day to make the change, and so he told Mr. Richards, I think — I don't know which one, both of them actually — that we could start this tomorrow or Friday; seems like this was on a Wednesday, which we did.

* * * * *

274 MR. RICHARDS: May I just make a statement — to be sure we are all agreed that the $1.60 wage rate was put into effect on August 17, 1962.

MR. SCHOOLFIELD: That is correct.

MR. SMITH: And it is understood that the contract ended on midnight of August 16.

MR. RICHARDS: Yes, by its terms.

MR. SCHOOLFIELD: By its terms, right.

* * * * *

G. C. Exhibit No. 1(c)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

EMPIRE TERMINAL WAREHOUSE COMPANY	)	
and	)	Case No. 16-CA-1722
DALLAS GENERAL DRIVERS, LOCAL UNION 745, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, WAREHOUSEMEN, CHAUFFEURS AND HELPERS OF AMERICA	)	

EXCERPTS FROM
COMPLAINT AND NOTICE OF HEARING

* * * * *

2.

Respondent is now and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 721 South Austin Street, Dallas, Texas, hereinafter referred to as the warehouse, where it is now, and has been at all times material herein, continuously engaged in storage and delivery service.

3.

Respondent during the past 12-month period, which period is representative of all times material herein, engaged in storage and delivery service constituting a link in the chain of interstate commerce, of which operations it derived a gross revenue in excess of $50,000. During this

same period of time, Respondent performed services valued in excess of $50,000 for enterprises located outside of the State of Texas.

4.

Respondent is now and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

Dallas General Drivers, Local Union 745, International Brotherhood of Teamsters, Warehousemen, Chauffeurs and Helpers of America, herein referred to as the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

All truck drivers, helpers, shipping and receiving clerks, leadmen, fork lift operators and warehousemen, exclusive of all other employees, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

7.

On or about May 22, 1956, a majority of the employees of Respondent in the unit described above in paragraph 6, by a secret ballot election conducted under the supervision of the Regional Director for the Sixteenth Region of the National Labor Relations Board, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent, and on or about May 29, 1956, the National Labor

Relations Board certified the Union as the exclusive bargaining representative of the employees in said unit.

8.

At all times since May 29, 1956, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees in the unit described above in paragraph 6, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

9.

(a) Commencing on or about June 7, 1962, and continuing to date, the Union has requested, and is requesting, Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective bargaining representative of all the employees of Respondent in the unit described above in paragraph 6.

(b) On or about August 16, 1962, and at all times since, the Union has requested the Employer to furnish to the Union financial records relating to the Employer's justification and explanation for wage decreases and related matters.

* * * * *

DATED at Fort Worth, Texas,
this 8th day of February, 1963.

[SEAL]

/s/ Elmer Davis, Regional Director
National Labor Relations Board
Sixteenth Region
Sixth Floor Meacham Building
110 West Fifth Street
Fort Worth, Texas.

G. C. Exhibit No. 9

* * *

Law Offices
Allen P. Schoolfield, Jr.
1200 Republic National Bank Bldg.
Dallas 1, Texas

August 8, 1962

CERTIFIED — RETURN RECEIPT REQUESTED

Mr. C. M. Roseborough
Assistant Business Agent
Dallas General Drivers, Warehousemen & Helpers
Local Union 745
1727 Young Street
Dallas, Texas

Re: Empire Terminal Warehouse Company

Dear Mr. Roseborough:

This letter is directed to you as Chairman of the union negotiating committee in contract negotiations for Empire Terminal Warehouse Company. The company and the union have met in bargaining sessions on July 13, July 24, July 30, August 1 and with Federal Mediation and Conciliation on August 6.

There has been much discussion of the union demands and the company has presented complete proposals to the union with the exception of the company's proposed wage scale. The company has repeatedly advised the union that the contract between the parties does not permit Empire to maintain a competitive position among the general merchandising warehouse companies in the immediate area and that the company proposes, requests and demands some economic relief in any new contract agreed upon by the parties. The union, on the other hand, has flatly stated that it will not sign or agree to any contract unless said contract contains economic benefits over and above the present contract in force and effect between the parties.

Please be advised that the company's wage proposal in negotiations for a new contract is $1.60 per hour across the board for all classifications. This proposed wage decrese is necessary in order that the company can improve its profit margin and thereby improve its competitive position among the general merchandising warehouses in the area. At the last bargaining session on August 6 the company presented to you, even though you stated you were not interested, a wage survey taken among a representative group in general merchandising and household goods warehousing in the area. The wage scale offered by the company is representative of that wage survey.

Your attention is directed to the company's proposals in paragraph 4.2. There has been much discussion of this section between the parties in bargaining sessions. The company must insist on this particular section in order to effectively and efficiently operate its warehousing business. The parties also discussed in bargaining sessions of July 13 and July 24 the work rules posted by the company effective June 13, 1962. In our bargaining session of August 1, 1962, the parties agreed that the contract expired at midnight, August 16, 1962.

Because of the competitive necessities outlined above, the company proposes to put in force and effect its wage proposals of $1.60 per hour, paragraph 4.2 of the company's proposals, and enforcement of its work rules as of August 17, 1962, so that it may improve its competitive position as soon as possible. We are ready, willing and anxious to discuss and resolve all of these matters with you and your negotiating team. We hope we can meet as often as necessary before the termination of the contract and thereafter. Please advise me when you can meet to further discuss these issues.

The company also wishes to advise you that it is in negotiations for additional warehouse space in the old Schoelkoppf Building at 600 South Austin in order that it may service a new customer. Because of the economic saving involved and the lack of company equipment, the company proposes to sub-contract or use common carrier motor carriers for shipments from this new facility and to unload its box-cars on a sub-contract basis. The company will use employees from the bargaining unit as order fillers and other general warehousing work. We also wish to discuss these matters with you as soon as possible.

Please be advised that if you have any solution on an economic basis whereby the company can operate more competitively, please be prepared to present these proposals at your earliest convenience. The company stands ready for bargaining sessions on a few hours notice at any time in the future.

Sincerely,

/s/ Allen P. Schoolfield, Jr.
Attorney and Member of the
Company Negotiating Team

APS Jr/jaf

cc: Mr. Jack Huntington, Negotiator
Empire Terminal Warehouse Company
721 South Austin Street
Dallas, Texas

Mr. Gideon Thomas, Negotiator
3112 Wendelkin
Dallas, Texas

Respondents' Exhibit No. 1

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS

Local Union No. 745
1727 Young St.
Dallas, Texas

* * * * * *

October 9, 1962

Mr. D. White
Safeway Stores, Inc.
P. O. Box 2218
Dallas, Texas

Dear Sir:

Members of our local union have been engaged in a lawful strike against City Delivery Service Co., Inc., dba Empire Terminal Warehouse Company of Dallas since September 10, 1962. This local has enjoyed amicable relations with Empire Terminal for a number of years. However, attempts to negotiate a new contract were fruitless. The employer upon expiration of the old agreement immediately reduced employee wages in amounts ranging from 55 to 40 cents per hour and thus brought about the present strike.

Stores operated by your company are presently selling a number of products that have been warehoused behind our picket line at Empire Terminal Warehouse, and in many instances delivered to you by persons doing the work formerly performed by the striking employees at Empire Terminal Warehouse.

The strike at Empire Terminal Warehouse is still in progress and in order to win this strike we must ask the consuming public not to purchase products warehoused and distributed from the Empire Terminal Warehouse.

It is our intention to employ all lawful and legitimate means in conducting a consumer appeal at your stores that sell the products warehoused and distributed by Empire Terminal Warehouse Company. The campaign will be conducted by handbills, and other lawful methods of publicizing our appeal to the consumers. It will be limited to consumer entrances to your stores and away from employee or service entrances.

We do not intend that any of your employees cease working or refuse to handle any product as a result of this campaign. You may wish to post this letter so that your employees will be aware of the purposes of our consumer campaign.

As we have indicated, our information indicates that you are presently selling the products warehoused and distributed by Empire Terminal Warehouse Company. If, however, this information is not correct, please notify the undersigned and we will see that the campaign is transferred to other stores where such products are actually being sold.

It may also be that deliveries are being made to your stores or warehouses by Empire Terminal Warehouse Company or by firms that have allied with Empire Terminal in their labor dispute. You should be advised that it is our intention to picket such delivery trucks at the times these trucks are at your premises. The picketing will clearly indicate that our dispute is limited to Empire Terminal Warehouse Company or its allies. In order to limit any possible radial effects of such picketing, we would appreciate the right to come on premises controlled by you and conduct our picketing in as close proximity to the situs of our labor dispute, i.e., the delivery truck. If we do not receive the permission to come upon your premises any such ambulatory picketing will have to be conducted on the public way in as close proximity as possible to the area in which employees of Empire Terminal or their allies are performing work.

We would appreciate your cooperation in these matters, and would appreciate your advising us whether or not we can have permission to come upon your premises to conduct our ambulatory picketing.

Sincerely,

/s/ C. M Roseborough
Assistant Business
Representative

CMR:AW
Certified Mail
Return Receipt Requested No. 434771

[Dated May 23, 1963]

IR-255-63
Dallas, Tex.

INTERMEDIATE REPORT

Before: George A. Downing, Trial Examiner

Statement of the Case

This proceeding, brought under Section 10(b) of the National Labor Relations Act as amended (61 Stat. 136; 73 Stat. 519), was heard at Dallas, Texas, on March 27 and 28, 1963, pursuant to due notice. The complaint, issued on February 8, 1963, by the General Counsel of the National Labor Relations Board, on a charge dated September 7, 1962, alleged that Respondent engaged in unfair labor practices proscribed by Section 8(a)(5) and (1) of the Act on and after June 7, 1962, by refusing to bargain with the Union as the exclusive bargaining representative of its employees in an appropriate unit. Respondent answered denying the unfair labor practices.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Jurisdictional findings

Respondent, a Texas corporation with its principal office, place of business, and warehouse at Dallas, Texas, is engaged in storage and delivery services constituting a link in the chain of interstate commerce. Its gross annual revenue derived from said operations for enterprises located outside the State of Texas exceed $50,000. Respondent is therefore engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

The Charging Party, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. Introduction and issues

The Union was certified by the Board's Regional Director in 1956, as the collective-bargaining representative of Respondent's employees in an appropriate unit (see Conclusion of Law number 1, *infra*), and Respondent and Union have since enjoyed contractual relations. The last contract was due to expire on August 17, 1962, and bargaining negotiations looking toward a new contract were conducted by committees whose chief spokesmen were Attorney Schoolfield and Vice President Jack S. Huntington for Respondent, and Business Representative C. M. Roseborough and Attorney Richards for the Union. Meetings were held on July 13, 24, and 30; August 1, 6, 15, and 16; September 24 and 27; October 3 and 12, 1962; and on March 12, 1963; but no agreement was reached. A strike was called on September 10 which is still pending. The strikers were replaced within 2 days.

The issues in the case are whether Respondent refused to bargain with the Union in the following respects as charged in the complaint, as amended: (a) By refusing to furnish on request financial records relating to Respondent's explanation of, and justification for, making a wage decrease; (b) by unilaterally changing existing wage rates and other terms and conditions of employment on August 17; and (c) by unilaterally

changing terms and conditions of employment by subcontracting to English City Delivery on September 10 certain cartage work performed by employees within the unit.[1/] There is a further issue as to whether the strike was an unfair labor practice strike from its inception and, if it was not, whether it was converted to one by the subsequent unfair labor practice of unilateral subcontracting.

B. The negotiations; the wage decrease; the strike

Negotiations began on July 13 with the Union presenting as its proposal a draft of the existing contract in which it had interlined a few minor changes. Moneywise, the Union was proposing an increase in the employer's contribution to the health and welfare fund of 50 cents per employee per week, and a flat across-the-board wage increase of 25 cents for each year of a 3-year term. At the next meeting on July 24, the Company presented its counterproposal, which contained substantial modifications of the existing contract but no provision for wage rates.

Roseborough testified that there was discussion of a number of

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1/ Although the complaint also alleged a general refusal to bargain concerning wages, hours, and terms and conditions of employment, the General Counsel asks in his brief for findings that Respondent violated the Act only in the three specific respects above set forth, which position accords with his apparent theory of the case as he litigated it. Though there were occasional suggestions in argument that Respondent's bargaining manifested some lack of good faith, such claims were themselves related to Respondent's actions in the three respects above specified. In any event, I find no basis in the evidence for a finding generally that Respondent did not bargain in good faith, and I accordingly confine my summary of the negotiations below to the specific points on which the bargaining foundered.

the changes which Respondent proposed, including seniority, on which the Union agreed to work out something to afford some relief. When Schoolfield sought to discuss the "economic factors," Roseborough suggested they endeavor to work out the other issues which did not affect cost. The discussions were mainly general in character, without definite agreement being eached, and with both sides agreeing to take "under advisement" specific proposals advanced by the other side.

Huntington testified that both Respondent and Union stated their position on wages at the July 24 meeting. The Company stated that it was paying from 35 to 50 cents an hour more for wages than its competitors, that it could obtain labor for less than it was paying, and that it was unwilling to continue any longer to pay more than its competitors. Respondent advanced the argument that it would not pay 35 cents a gallon for gasoline if it could get it for 25 cents, nor $5,000 for a truck which it could buy for $4,000 and that therefore it should not be expected to pay more for the "wage commodity" than its competitors were paying. The Union's position was that it would not sign a contract which did not provide for a wage increase, and later, on July 30, it added that any new contract must also provide for an increase in health and welfare benefits.

Roseborough, who admitted his recollection was faulty as to specific discussions at particular meetings, admitted on cross-examination that the positions of the parties were as stated by Huntington, that Respondent indicated early in the negotiations that it was seeking a wage reduction, and that he (Roseborough) made the statement that "the union would not bargain down, but always bargain up."

Roseborough also testified that in the August 1 meeting Schoolfield "kept asking" him about a wage proposal and that he replied that the Union had submitted a wage proposal and that the next move was the Company's, since it had given the Union no reason to believe it could not pay more money. Schoolfield responded that the Company had a lucrative business and was not pleading poverty, or inability to pay, but that the Company was not in a competitive position as regarded wages, that it was losing accounts because of that fact, and that it would not agree to any kind of a wage increase. Roseborough nevertheless demanded that the Company should submit proof, by producing its books and records, that it could not pay more for wages, but Schoolfield refused.

Beginning August 6, all meetings were held in the presence of a Federal Mediator, called in by the Union. At that meeting, though Respondent did not produce its financial records, it did produce evidence that it was operating at a substantial competitive disadvantage as regarded wage costs. Thus it presented to the Union a wage survey made by Schoolfield among Respondent's competitors which concealed the identities of individual competitors under lettered designations, A through G. The survey purported to show that the average wage rate paid by the competitors for warehouse labor was $1.40 an hour, and for drivers $1.56 an hour, as against the rate of $2 an hour under the existing contract and a rate of $2.25 sought by the Union for the new contract.

Roseborough demurred that he did not know who the lettered companies were or where their warehouses were. Schoolfield offered to

disclose to some third party, such as the Federal Mediator, the identities of the competitors so that the Union could verify the correctness of the wage rates listed in the survey, but Roseborough disclaimed any interest, stating that the Union was interested in bargaining only for Empire's employees. Actually, Roseborough was well aware that all of the competitors' warehouses were unorganized, and he was "reasonably sure" that their wages were lower than Respondent's.

There was also testimony by Roseborough that on August 6, Schoolfield renewed his inquiry about a wage proposal and that he (Roseborough) replied that until they worked out the "basic" items in the contract, he saw no point in discussing the "cost" items. Roseborough proposed instead that since the contract expiration was close, the contract be extended temporarily, subject only to an increase of 50 cents a week to be paid into the health and welfare fund, negotiations be continued, and that in the meantime he would ascertain whether the employees would agree to a lesser wage offer. Schoolfield agreed to give Roseborough an answer later.

On August 8 Schoolfield wrote Roseborough at length (see Appendix A), repeating Respondent's arguments for "economic relief," referring to the wage survey among competitors previously submitted, and notifying Roseborough that Respondent's wage proposal was for a *decrease* to $1.60 an hour for all classifications and that Respondent proposed to put the decrease into effect on August 17. The letter concluded with expressions of willingness to meet as often as necessary on

short notice to resolve all matters and with the request that the Union present at its earliest convenience any solution which it might have whereby the Company could operate more competitively on an economic basis.

Two meetings were held on August 15 and 16, in which Respondent stated its intention to put the proposed wage decrease into effect over the Union's objections. Upon renewal by the Union of its request that Respondent produce its financial records, Respondent repeated its position as previously stated.

Roseborough testified that on August 15 he suggested that he would present a proposal on seniority which would give Respondent more flexibility in its operations, and also suggested the possibility of working out a rate range under which new employees would start at a lower rate and progress gradually to the top of the range. Respondent, however, stated that it would be interested in no range which would extend beyond $1.60 per hour maximum, and the Union in turn did not agree to any rate less than the 25 cent increase which it originally proposed.

Roseborough testified that he presented his seniority proposal on August 16, and that Schoolfield agreed that it would help to cure a problem concerning the assignment of work. Schoolfield stated, however, that the wage decrease would be put into effect as of midnight on that day, that the change in seniority would also be effected, and that the rest of the contract would remain the same except for the checkoff.

Roseborough again suggested that the contract be extended for

60 days, with rates of pay unchanged, and that negotiations be continued. He also renewed his inquiry about a lower starting rate for new employees, but Schoolfield repeated his former position and stated that the Company would put its wage decrease into effect and that perhaps during the ensuing negotiations, the matter of wages could be worked out.

On August 17 Schoolfield wrote Roseborough (see Appendix B) informing him that the Company's proposals of August 8 (with an exception relating to Article 4.2) had been put into effect, "there being no satisfactory counterproposals from you on wages." The letter also reviewed at some length the prior positions of the parties and assured the Union that the Company was anxious to bargain on economic matters and to receive any proposals which the Union might make. The final paragraph contained the following reference to the August 16 meeting:

> This is to confirm your final statement in the session of August 16 when you said there was no point to further bargaining unless either side changes its position. Please be advised that we will advise you of any change in our position and I assume you will so notify us.

Roseborough responded on August 23 with a lengthy recital of the Union's appraisal of the bargaining situation, with particular reference to the August 16 meeting (see Appendix C). The heart of the Union's position is well summarized in the following excerpt:

> The Company advised that effective August 17, 1962, it was putting into effect a drastic reduction in the wages of the covered employees as well as adopting certain changes in work rules and practices. This action was announced despite the fact that no impasse had been reached and the Union was attempting to negotiate concerning wages. Admittedly the Union is placed in a difficult position to discuss

> wages, when, in fact, the employer declines to give consideration to union proposals and refuse to apprise the Union of the economic condition of the Company. The only impasse that could have been reached is one unilaterally created by the employer's adamant refusal to negotiate in good faith. These changes were protested by the union as another instance of bad faith bargaining by the company, and despite the union's renewed request to inspect the financial records of the company, the company denied the request.

The letter concluded with the request that the Company rescind the wage increase and that it reenter upon good faith negotiations.

Schoolfield replied on August 27 that his prior letters stated the Company's position, but again expressed readiness to meet and to discuss whatever proposals the Union might have to offer.

Following a strike vote, a strike was called on September 10, and practically all of the employees went out on strike. All of the strikers were replaced by September 12.

Though further meetings were held on September 24 and 27 and on October 3 and 12, neither the scant testimony nor the correspondence contained anything of significance concerning either contract issues or the strike. The following facts are relevant mainly as background to the matter of subcontracting, the evidence concerning which is summarized in section C, below:

On September 27, the Union presented its draft of a management rights provision, which was agreed to tentatively, with the following amendment added at the meeting: "The employer reserves the right to subcontract delivery work where past practice has demonstrated such subcontracting to be economically sound." Richards testified that that

amendment was made in the light of discussions of the fact that Respondent sometimes picked up "casual" employees to do unloading work and that there had also been instances of subcontracting deliveries at two subsidiary warehouses on Bengal Street and Amelia Street.

On October 12, the Union presented a strike settlement proposal which called (in part) for the reinstatement of all strikers, restoration of the wage reduction, extension of the old contract for 1 year, increased contributions of 50 cents a week to the health and welfare fund, and a wage increase of 6 cents per hour for all employees, 6 months after the contract is executed, upon their return to work. The Company rejected the proposal. Huntington testified that thereupon Roseborough stated that although the Union hesitated to do so, it would use every means within its power to break the Company, if that was necessary, and thereupon concluded the meeting.

C. Subcontracting

All facts which are relevant to the issue of subcontracting were either stipulated or are undisputed.

On or about October 12, Respondent subcontracted to English City Delivery certain deliveries to A & P and Safeway warehouses from its main warehouse on Austin Street which had formerly been made by Respondent's employees within the bargaining unit. The Union was given no notice of Respondent's intention to subcontract the deliveries in question and no opportunity to consult or negotiate about the matter.

Though the foregoing facts will alone make out a case according

to the General Counsel and the Union, considerable additional evidence was adduced in connection with Respondent's defenses.

Respondent's warehousing facilities consisted of its main warehouse on South Austin Street and two small warehouses on Bengal Street and Amelia Street. The Bengal Street warehouse was opened in January 1962, or earlier, and Amelia Street in August.[2/] Respondent did not make any of its deliveries from either of these warehouses but contracted all such cartage work to English City Delivery. Though it customarily performed its own cartage work at Austin Street, there were occasions when deliveries were made for it by other concerns, e.g., rush orders when Respondent had no truck available, parcel deliveries to the post office, and deliveries of large orders where its equipment was inadequate.

A & P and Safeway Stores were customers of Respondent, and deliveries were made to them from the Austin Street warehouse prior to the strike in normal fashion, i.e., if the goods were purchased f.o.b. the customer's dock, the Respondent made the deliveries with its own trucks, but if f.o.b. Respondent's dock, then A & P and Safeway sent their respective contract haulers to pick up the goods.

After the strike began the Union wrote letters to A & P and Safeway on October 9, informed them of its strike against Empire, referred to their patronage of Empire's warehouses and of the deliveries of goods to them by persons other than striking employees, and continued in part:

[2/] Both of those warehouses were closed shortly before the hearing, but Respondent now operates a new warehouse on the corner of Jupiter and King Streets.

> It is our intention to employ all legal and legitimate means in conducting a consumer appeal at your stores that sell the products warehoused and distributed by Empire Terminal Warehouse Company. The campaign will be conducted by handbills, and other lawful methods of publicizing our appeals to the consumers. It will be limited to consumer entrances to your stores and away from employee or service entrances.
>
> We do not intend that any of your employees cease working or refuse to handle any product as a result of this campaign. You may wish to post this letter so that your employees will be aware of the purposes of our consumer campaign.

The letter also mentioned the possibility that deliveries were being made by firms who were allied with Empire in the labor dispute and stated the Union's intention to picket the delivery trucks at times when they were on the addressee's premises, which picketing would clearly indicate that the dispute was limited to Empire or its allies. Permission was requested, in order to limit any possible "radial effects" of the picketing, to come onto the premises so that the picketing could be conducted in close proximity to the situs of the labor dispute, i.e., the delivery truck. Absent permission, the Union stated that its ambulatory picketing would have to be conducted on the public way, as close as possible to the area in which employees of Empire or its allies were performing work.

Respondent called witnesses from both A & P and Safeway who testified to receiving calls from a union representative in which statements and appeals were made which corresponded to those contained in the letter. Thereafter Respondent conferred with representatives of both customers, who requested that Respondent not send its trucks to make deliveries. An arrangement was worked out with them for making

all deliveries, whether f.o.b. Respondent's dock or f.o.b. the customer's dock, which involved in part Respondent's subcontracting to English City the deliveries to A & P and Safeway from the Austin Street terminal. A & P goods f.o.b. Respondent's dock, which had formerly been picked up by Cathey & Carrell, contract hauler for A & P, were thenceforth loaded into boxcars at Austin Street and sent by rail to A & P, and rail cars were also used in making similar deliveries to Safeway.

The Union conducted no ambulatory picketing, handbilling or leafletting at any A & P or Safeway Stores, or at any other retail stores in Dallas.

News about the subcontracting finally reached the Union in a report from the striking employees around December 17, [3/] and on the latter date, Roseborough wrote Respondent protesting the action and requesting that Respondent discontinue it promptly and restore the work to the employees in the bargaining unit.

Schoolfield replied on December 20, advising that the allegations in the letter were incorrect, and that, "There has been no subcontracting other than that discussed with you in negotiations, excepting that forced on the Company by union actions during the strike." Schoolfield also indicated readiness to discuss the matter further if the Union deemed it necessary.

[3/] Though the evidence does not show when knowledge reached the strikers, it was presumably at or about the time they reported the fact to the Union.

On February 21 Schoolfield wrote further that Respondent was anxious to meet and bargain on the subject of subcontracting and on the subject of wages, and after further correspondence and telephone calls a meeting was set up for Tuesday, March 12.

Attorney Richards testified that the Union protested the subcontracting of the bargaining unit work, that Schoolfield admitted that there had been subcontracting to English City for deliveries to A & P and Safeway, that it had been done without notice to the Union, and that insofar as the main warehouse on Austin Street was concerned, those deliveries had formerly been made by employees in the bargaining unit. Schoolfield contended, however, that the subcontracting was minimal in amount and had had no substantial impact on the work of the bargaining unit, and that the subcontracting had been necessitated by the Union's correspondence or communications to A & P and Safeway. Schoolfield announced that Respondent was immediately discontinuing that subcontracting, and it did so.

Respondent also offered testimony and various transcriptions from its records to support Schoolfield's contentions concerning minimal impact, General Manager Richard Williams testified that Respondent laid off no employees as a result of the subcontracting in question and that in fact the employees lost no employment, or hours of work, because Respondent arranged to keep the employees busy for their full normal workdays by giving them other work to do. His latter testimony became plainly suspect on further examination, as well as from an analysis of Respondent's records. Thus, Williams admitted that the work to be

done following the subcontracting "would have to come down some," because the employees no longer had to load and stack the goods or make the deliveries to A & P and Safeway; that the hours worked by the employees fluctuated not only from month to month and week to week, but also from day to day; and he estimated that only 1 hour a day, on an average, had formerly been spent in making the deliveries in question.

Respondent's transcriptions, though inconclusive on most points, showed frequent daily fluctuation in the number of employees on the payroll and a consistent fluctuation in the total weekly hours worked, both in *regular* and in *overtime* hours. When this is viewed in the light of Williams' concession that Respondent did not pay employees for work which they were *not* performing (e.g., for not delivering to A & P and Safeway), it is plain that Respondent did not "make work" for employees to make up for the time which they might otherwise have spent on the A & P and Safeway work.

In addition Respondent's records exposed Williams' attempt to reduce to *de minimis* the subcontracting work. Thus the transcripts showed the following amounts paid for making the A & P and Safeway deliveries in the months following the strike:[4/]

October	$210.89
November	$297.38
December	$238.30
January	$468.72

4/ In the period from September 1961, through September 1962, there had been no such payments saved for a single item of $9.60 in September 1962 (presumably after the strike).

Even allowing a substantial margin for other management costs and for profit, it is plain that the labor cost involved in performing contract services in such amounts was substantial, and certainly above *de minimis*. Certainly it would have exceeded by a wide margin compensation for the hour a day which Williams estimated.

D. Concluding findings

1. The refusal to produce financial information

It was plain from the evidence that, either intentionally or unintentionally, the Union misinterpreted the nature of Respondent's position on the wage issue and that, ignoring the disclaimer of inability to pay, it insisted that Respondent produce records to establish whether the Company was in fact financially able to meet the Union's increased wage demands. What Schoolfield produced was evidence which supported Respondent's *true* contention that its competitors (whom the Union had failed to organize) were paying substantially less for the "wage commodity" than Respondent and that Respondent was being required to operate at a corresponding competitive disadvantage. The Union made no attempt to check on the accuracy of the survey, though it could easily have done so. Indeed, it did not need to do so, for Roseborough had every reason to believe that Schoolfield's representations were correct. The Union purported instead to ignore the evidence on the excuse that it was bargaining only for Respondent's employees.

Though General Counsel and Union rely strongly on testimony by Huntington that Respondent was losing customers and "things are getting

rough," that testimony was plainly related, not to any claimed inability to pay, but to the disadvantage which Respondent was suffering on wage rates, a condition which would be aggravated by the Union's proposed wage increase.

I am aware of no authorities which would support a refusal to bargain finding under the circumstances which are found in this case. Such cases as General Counsel and Union have cited are plainly distinguishable. As the Board acknowledged in *Taylor Foundry Company*, 141 NLRB No. 62 (cited by General Counsel and Union), it is understandable that an increase in operating costs may place an employer in a disadvantageous position with respect to its competitors, and a mere assertion thereof is not necessarily a claim of inability to pay which would call for some substantiating proof under *N. L. R. B. v. Truitt Manufacturing Co.*, 351 U.S. 149. The Board found in *Taylor*, however, that the employer went beyond asserting that position, citing testimony on the employer's behalf that "if we increased our labor costs that we would lose a margin of profit that we have and *we can't exist.*" (Emphasis by Board.) When the union asked the employer to produce information to support its claim that it could not afford to pay a wage increase, the employer furnished information comparing his own wage scales with his competitors, but the Board held that that, without more, was insufficient in view of the employer's asserted inability "to exist" if he granted a wage increase.

But here Respondent neither directly or indirectly suggested the

possibility of going out of business if it gave a wage increase, and it expressly disclaimed financial inability, and the wage survey was not offered to support any claim of inability "to exist."

In *Cincinnati Cordage & Paper Co.*, 141 NLRB No. 7, also cited by General Counsel and Union, the Board affirmed findings by the Trial Examiner that the employer "harbored within its own breast" the view that some wage increase might have been in order but that it "sat tight" and waited for the union to "push the right button." Here, to the contrary, there was no indication or suggestion that Respondent was willing to accede to a more modest increase than the Union sought; indeed, both its words and its actions were consistent with its own demands for a decrease.

Neither is there anything in the leading case of *Truitt Manufacturing Co., supra*, which requires a refusal to bargain finding here. There the employer raised directly the issue of economic inability to pay increased wages, but nevertheless refused the union's request to produce evidence substantiating its contention.

I therefore conclude and find that Respondent did not refuse to bargain by refusing to produce the financial information which the Union requested.

2. The unilateral wage decrease

The evidence showed that early in the negotiations Respondent informed the Union that it was no longer willing to continue paying wages which were substantially higher than those of its competitors and that it

was seeking a wage decrease; that on August 6 it submitted evidence supporting its position; that on August 8 it informed the Union it was proposing a wage cut to $1.60 an hour and was further proposing (without prejudice to further negotiations) to put the decrease into effect upon expiration of the contract term on August 17. Thereafter two bargaining sessions were held in which the issue was fully discussed, but without basic change. Though the Union suggested a lower starting rate for new employees, it made no reduction in the increases which it sought for old ones. It also proposed that the contract be extended temporarily during further bargaining, but Respondent countered that bargaining be continued with the decreased rates in effect, and that the Union present any solution it might have.

I conclude and find, first, that as further bargaining was plainly contemplated at the time, there was no impasse on the wage issue, which was alone the real impediment at the time to reaching a contract. I conclude and find, second, that Respondent's action in reducing wages was unilaterally taken over the Union's objections, but that it was done only after due notice and full consultation on the issue. The two meetings between August 8 and 17 were plainly adequate for enabling the parties to explore further and fully their respective positions which had been stated in general terms early in the negotiations, i.e., the Union was demanding a 25-cent increase; the Company, unwilling to pay longer substantially higher wages than its competitors, was seeking a decrease.

This is therefore not a case of "Unilateral action by an employer

without prior discussion with the union" which would "amount to a refusal to negotiate" and would "of necessity obstruct bargaining." *N. L. R. B. v. Katz,* 369 U.S. 736, 747. The Supreme Court there distinguished the situation before it from "one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the union has rejected as too low," citing *N. L. R. B. v. Bradley Washfountain Co.* , 192 F. 2d 144, 150-152, and *N. L. R. B. v. Landis Tool Co.* , 193 F. 2d 279.

The foregoing holdings effectually answer contentions made by General Counsel and Union that actual impasse is necessary before an employer may legally put into effect a wage change which he has proposed during negotiations. See also the recent case of *Braswell Motor Freight Lines*, 141 NLRB No. 105, in which the Board affirmed the Trial Examiner's finding that the employer did not unlawfully terminate overtime pay without consulting the Union because, among other things, the employer notified the Union of the contemplated change and bargained with it on the subject, because no final action was taken until after the discussion of the subject, and because the employer's final letter to the Union left the matter open for further discussion or counterproposals.

To the extent that *Servette, Inc.* , 133 NLRB 132, 139, is in point, I find that the facts here bring the present case within the ambit of the Board's holding, cited by the General Counsel, that the Union, as the established bargaining representative, was entitled to reasonable notice and an opportunity to bargain over the proposed change.

Other cases cited by General Counsel and Union need not be discussed; all are distinguishable on their facts.

I conclude and find that Respondent did not refuse to bargain on or about August 17 by putting into effect decreased wage rates concerning which it had formerly given notice and consulted with the Union.

3. The unilateral subcontracting

Contrary to its procedure on the wage decrease, Respondent took unilateral action on subcontracting without notice to or consultation with the Union. The law is well established that such action in a situation like the present one constitutes a refusal to bargain. *Hawaii Meat Company, Ltd.* , 139 NLRB No. 75; *Fibreboard Paper Products Corp.* (Supplemental Decision), 138 NLRB No. 67; *Town and Country Manufacturing Company*, 136 NLRB No. 111, enfd. 53 LRRM 2054 (C.A. 5). The Board's rationale is spelled out at length in *Town and Country* and in *Fibreboard, supra.* See also *N. L. R. B. v. Brown - Dunkin Co.*, 287 F. 2d 17, 20 (C.A. 10).

Closest in point factually to the present case is the *Hawaii Meat* case, *supra,* where the employer subcontracted, without notice, certain delivery work after the union had called a strike. The Board held the decision to be a mandatory subject of bargaining, even though it may have been motivated by economic considerations rather than by opposition to the principals of collective bargaining. The Board pointed out that it was not holding that before a strike ensued an employer must advise the union in advance of his plans to counteract the impact of a

strike, but that after a strike begins, he must give the union an opportunity to bargain about an action which involves elimination of unit jobs and the consequent erosion of the bargaining representative's status, as well as the permanency of the job classifications which were held by employees when the strike began.

Contrary to Respondent's contention, I find the foregoing cases to be controlling, rather than *N. L. R. B. v. Mackey Radio and Telegraph Company*, 304 U.S. 333, on which Respondent relies and which dealt with an employer's right to run his business during a strike by permanently replacing the striking employees. Respondent's action here was not a matter of replacing striking employees in order to carry on its business, for it had already filled the places left vacant by the strikers. Instead, the calculable effect of its action was to alter the composition of the bargaining unit and to impair both the status and the authority of the certified representative to conduct bargaining for all the employees in the unit.

The evidence did not establish Respondent's defense that its action was without substantial impact on the bargaining unit work. The amounts of the contract payments alone plainly showed that the labor cost involved was more than *de minimis*.[5/]

[5/] Respondent's defense is reminiscent of the story of the man who cut off the dog's tail an inch at a time. As the court observed in *U. A. W., Local 301 v. Webster Electric Co.*, 299 F. 2d 195 (C.A. 7), in holding that an employer's action in contracting out the work of a few members of the bargaining unit constituted a breach of a contractual union-shop clause:

> If this small group can be thus replaced, then other groups

(cont'd)

Similarly without merit was Respondent's defense that its action was forced by the Union's written and oral appeals to some of its customers. Notice to and consultation with the Union regarding its contemplated action would doubtless have rendered any action unnecessary, as plainly indicated by the amicable settlement of the issue during the single short conference on March 12. But regardless of whether Respondent could reasonably have expected approval of the Union or other settlement of the matter, its legal duty was to give notice and to consult with the Union before contracting away a portion of the bargaining unit work.

By brief, Respondent advances for the first time the contention that the Union's letters and oral appeals showed that it was engaging in an *unfair labor practice*. No such contention was made in Schoolfield's letter of December 20, some 2 months after the action, nor in the negotiation meeting on March 12, 1963, when the issue was discussed and settled. Nor, so far as the record shows, did Respondent file an unfair labor practice charge, which if meritorious, would have made mandatory, under Section 10(1) of the Act, the seeking by the Board of an injunction from the United States District Court. Furthermore, Respondent makes the contention flatly and without specificity, leaving wholly conjectural the basis of its claim. Finally, Respondent made

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5/ (continued)
could meet the same fate, and eventually it would be possible to deplete a major part of the "protected" union shop force. We hold it would be inconsistent with the basic purpose of the agreement to approve the contracting out of the janitorial jobs here involved.

no attempt at the hearing to establish that the Union sought to implement its requests, and made no denial of rebuttal evidence that the Union in fact conducted no ambulatory picketing, or handbilling, or leafletting.

Respondent cites the single case of *Local 294, Teamsters (K-C Refrigeration Transport Company)*, 124 **NLRB** 1245, enfd. 284 **F.** 2d 887 (**C.A.** 2), which is inapposite here in that the appeals for "cooperation" were found in that case to be themselves supplementation of picketing which the Board found to be illegal. (Id. at p. 1253.) Here to the contrary the Union notified Respondent's customers that it proposed to employ only lawful and legitimate means for the purpose of publicizing appeals to consumers and that it did not intend any of the employees to cease working or to refuse to handle any product. (See the provisos to Sections 8(b)(4) and (7).) To the extent that the possibility of picketing was suggested, the phrasing seemed carefully to meet the standards approved by the Board in *Moore Dry Dock Co.*, 92 **NLRB** 547.[6/]

Finally, even were Respondent correct in characterizing the Union's actions as an unfair labor practice, it was not legally entitled to combat it by committing another unfair labor practice, particularly when ready relief was so available to it under Section 10(1) of the Act. Two wrongs do not make a right under labor law, any more than they do elsewhere, and one unlawful act is not legal justification for another.

6/ Whether the suggested picketing would have met a further standard prescribed in the *Washington Coca-Cola* case (107 NLRB 299) is questionable, but so is the continued vitality of that decision. See, for example, the discussion of the Board's holding in *N. L. R. B. v. Local 294, Teamsters, supra*, at pp. 891-2 (cited and relied upon by Respondent above).

I therefore conclude and find that by subcontracting, on or about October 12, 1962, without notice to or consultation with the Union, the making of deliveries from its Austin Street warehouse to A & P and Safeway, formerly performed by employees in the bargaining unit, Respondent refused to bargain with the Union within the meaning of Section 8(a)(5) of the Act.

4. The character of the strike

I have found that Respondent did not refuse to bargain at any time before the strike began on September 10, and I find accordingly that the strike was an economic one in its inception. I have found also that Respondent's only refusal to bargain occurred on or about October 12, which was stipulated to be the date of the subcontracting to English City. The Union learned of the subcontracting through the employees around December 17, which presumably was immediately or shortly after the employees learned of it.

The Union's letter of December 17 and other evidence introduced by the General Counsel established that Respondent's unfair labor practice thereafter served to prolong the strike, thereby converting it into an unfair labor practice strike. The evidence is undisputed, however, that Respondent had permanently replaced all strikers by September 12, at a time when the strike was purely economic in character. Under those circumstances the subsequent conversion of the strike to an unfair labor practice strike will be without effect insofar as the reinstatement rights of the strikers are concerned.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. All truckdrivers, helpers, shipping and receiving clerks, leadmen, forklift operators, and warehousemen, exclusive of all other employees, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times since May 29, 1956, Respondent has recognized the Union as the exclusive representative of all the employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. By refusing to bargain collectively with the Union in the respect found in section D 3, above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action of the type which is conventionally ordered in such cases as provided in the Recommended Order below, which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act.

The evidence shows that Respondent itself took the initiative of remedying in part the effects of the unfair labor practices found above, by abandoning, after consultation, with the Union on March 12, 1963, the subcontracting of deliveries from its main warehouse to A & P and Safeway. Nevertheless, it had deliberately continued its practice for some 3 months over the protests of the Union, and its rejection of those protests seemed ambiguously to suggest that the subcontracting in question had been discussed during negotiations. Under all the circumstances I feel that a full remedying of the effects of the unfair labor practice will require not only the usual cease and desist order, but an affirmative order to bargain with the Union on the issue of subcontracting, and I shall so recommend.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

Empire Terminal Warehouse Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain with the Union concerning the matter of subcontracting work performed by employees within the bargaining unit.

2. Take the following affirmative action:

(a) Bargain collectively upon request with the Union concerning the matter of subcontracting work performed by employees within the bargaining unit.

(b) Post at its warehouse and offices, copies of the notice attached hereto, marked Appendix D.[7/] Copies of said notice to be furnished by the Regional Director for the Sixteenth Region, shall after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for the Sixteenth Region, in writing, within 20 days from the date of the receipt of this Intermediate Report what steps Respondent has taken to comply herewith.[8/]

Dated at Washington, D. C.

May 23, 1963

/s/ Geo. A. Downing
George A. Downing
Trial Examiner

7/ In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

8/ In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX A

August 8, 1962

CERTIFIED - RETURN RECEIPT REQUESTED

Mr. C. M. Roseborough
Assistant Business Agent
Dallas General Drivers, Warehousemen &
Helpers Local Union 745
1727 Young Street
Dallas, Texas

Re: Empire Terminal
Warehouse Company

Dear Mr. Roseborough:

This letter is directed to you as Chairman of the union negotiating committee in contract negotiations for Empire Terminal Warehouse Company. The company and the union have met in bargaining sessions on July 13, July 24, July 30, August 1 and with Federal Mediation and Conciliation on August 6.

There has been much discussion of the union demands and the company has presented complete proposals to the union with the exception of the company's proposed wage scale. The company has repeatedly advised the union that the contract between the parties does not permit Empire to maintain a competitive position among the general merchandising warehouse companies in the immediate area and that the company proposes, requests and demands some economic relief in any new contract agreed upon by the parties. The union, on the other hand, has flatly stated that it will not sign or agree to any contract unless said contract contains economic benefits over and above the present contract in force and effect between the parties.

Please be advised that the company's wage proposal in negotiations for a new contract is $1.60 per hour across the board for all classifications. This proposed wage decrease is necessary in order that the company can improve its profit margin and thereby improve its competitive position among the general merchandising warehouses in the area. At the last bargaining session on August 6 the company presented to you, even though you stated you were not interested, a wage survey taken among a representative group in general merchandising and household goods warehousing

in the area. The wage scale offered by the company is representative of that wage survey.

Your attention is directed to the company's proposals in paragraph 4.2. There has been much discussion of this section between the parties in bargaining sessions. The company must insist on this particular section in order to effectively and efficiently operate its warehousing business. The parties also discussed in bargaining sessions of July 13 and July 24 the work rules posted by the company effective June 13, 1962. In our bargaining session of August 1, 1962, the parties agreed that the contract expired at midnight, August 16, 1962.

Because of the competitive necessities outlined above, the company proposes to put in force and effect its wage proposals of $1.60 per hour, paragraph 4.2 of the company's proposals, and enforcement of its work rules as of August 17, 1962, so that it may improve its competitive position as soon as possible. We are ready, willing and anxious to discuss and resolve all of these matters with you and your negotiating team. We hope we can meet as often as necessary before the termination of the contract and thereafter. Please advise me when you can meet to further discuss these issues.

The company also wishes to advise you that it is in negotiations for additional warehouse space in the old Schoelkoppf Building at 600 South Austin in order that it may service a new customer. Because of the economic saving involved and the lack of company equipment, the company proposes to sub-contract or use common carrier motor carriers for shipments from this new facility and to unload its boxcars on a sub-contract basis. The company will use employees from the bargaining unit as order fillers and other general warehousing work. We also wish to discuss these matters with you as soon as possible.

Please be advised that if you have any solution on an economic basis whereby the company can operate more competitively, please be prepared to present these proposals at your earliest convenience. The company stands ready for bargaining sessions on a few hours notice at any time in the future.

Sincerely,

/s/ Allen P. Schoolfield, Jr.
Allen P. Schoolfield, Jr.
Attorney and Member of the
Company Negotiating Team

APPENDIX B

August 17, 1962

CERTIFIED - RETURN RECEIPT REQUESTED

Mr. C. M. Roseborough
Assistant Business Agent
Dallas General Drivers, Warehousemen &
Helpers Local Union 745
1727 Young Street
Dallas, Texas

Re: Empire Terminal
Warehouse Co.

Dear Mr. Roseborough:

I wish to review the company's position in the present negotiations. First, I refer to my letter of August 8, 1962, wherein I made certain proposals. As of this date, these proposals have been put in force and effect, there being no satisfactory counter proposals from you on wages.

I do wish to advise that the company is not placing into effect the complete Article 4.2 of the company's proposal. Rather the company is placing in effect the union's proposal with the changes made therein by you at the last bargaining session on August 16. That is, that seniority rights shall prevail at all times for layoffs, recall and vacations, if qualified, and that the employer retains the right in assignment of work. It is understood that employees not members of the bargaining unit will not be used as replacements for employees on regular classified jobs on any permanent basis. This would not include emergency work by supervision or other brief periods.

I want you further to understand that this company is not pleading an inability to pay and has never done so in any bargaining session as Mr. Richards implied. This company is a profitable operation but feels it is not good business to pay excessive wages. The company maintaining a $1.60 wage scale as of August 17 is done merely to even the cost of the labor commodity with that of its competitors in the area. We simply seek to lower operational costs.

I feel certain that if your union would agree to the cost items in our contract proposal that this company and your

union will easily reach a contract. I have repeatedly stated that the checkoff is offered to you in any contract that is agreed upon between the parties.

I have no alternative but to regard the problem between the parties as one of wage scale and costs. This company is anxious to bargain on economic matters and anxious to receive any proposals that you may have that could in any way answer the company's position. Your union has never made a wage proposal to this company or any other proposal that would in any way answer the company's competitive cost position.

The company, on the other hand, has presented to you a wage survey taken among the general merchandising and household goods warehouses in the area. The company has demonstrated that it believes it can maintain its employment level at the $1.60 per hour scale discussed with you. The entire problem is that this company is not willing to pay $2.00 or $2.25 an hour when it obviously can employ employees at $1.60 per hour. This is the entire company position and has always been so.

This is to confirm your final statement in the session of August 16 when you said there was no point to further bargaining unless either side changes its position. Please be advised that we will advise you of any change in our position and I assume you will so notify us.

Sincerely,

/s/ Allen P. Schoolfield, Jr.

Allen P. Schoolfield, Jr.

APPENDIX C

August 23, 1962

Mr. Allen P. Schoolfield, Jr.
1200 Republic National Bank Building
Dallas 1, Texas

Dear Mr. Schoolfield:

It is apparent from your letter of August 17, 1962, that you have a faulty recollection of the August 16th bargaining session and I take this opportunity to correct your recollection.

The company advised that effective August 17, 1962, it was putting into effect a drastic reduction in the wages of the covered employees as well as adopting certain changes in work rules and practices. This action was announced despite the fact that no impasse had been reached and the union was attempting to negotiate concerning wages. Admittedly the union is placed in a difficult position to discuss wages, when, in fact, the employer declines to give consideration to union proposals and refused to apprise the union of the economic condition of the company. The only impasse that could have been reached is one unilaterally created by the employer's adamant refusal to negotiate in good faith. These changes were protested by the union as another instance of bad faith bargaining by the company, and despite the union's renewed request to inspect the financial records of the company, the company denied the request.

Contrary to the implications of your letter, the union has made several counter propositions on economic matters, none of which have effected any change in the company position. Specifically, on August 16, in response to a company request for relief from seniority and classification provisions, the union made a proposal designed to afford the employer more flexibility and economy in operation. Employer conceded that the proposal did meet its needs and provided the desired relief. In the meeting of August 15, the employer advised that it would reconsider its position on wages if it could receive this relief on seniority and classification practices, the union proposal was made with the understanding that the employer would reconsider its wage proposal. Nevertheless on the 16th the employer, having acknowledged the desirability of the union seniority proposal, immediately indicated that this did not alter its position

on the $1.60 per hour wage. By your latest letter you indicate that you intend to put in effect the seniority proposal of the union, this is in contravention of the understanding upon which the proposal was made and the understanding between the parties at the conclusion of the meeting of the 16th.

In addition on the 16th the union made two proposals: the extension of the existing agreement for a period of 60 days to permit further development of contract negotiations. This proposal was summarily rejected by the employer, who advised that on August 17 it planned to put into effect the across-the-board wage reduction. In addition the union proposed the establishment of a rate range for the covered employees, the top of the range being pegged to the existing wage scales. The employer indicated that the only range it would consider would be one that limited wages to $1.60 per hour.

In sum, it is the position of the union that the employer has bargained in bad faith in violation of its duties under the Labor Management Relations Act as amended.

You erroneously characterize the union position at the conclusion of the meeting of the 17th. The union inquired of the employer if it desired to set another date for a meeting, to which the employer replied that it was not interested in setting a future meeting, but would meet upon request. The union indicated that it would like time to consider the company position before setting a new meeting.

I hope this will refresh your recollection regarding our last bargaining session. We request again that the employer rescind its unlawful changes in wages and conditions of employment and meet and discuss in good faith the terms of a new collective bargaining contract.

Sincerely,

C. M. Roseborough
DALLAS GENERAL DRIVERS,
WAREHOUSEMEN & HELPERS
LOCAL UNION 745

APPENDIX D

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

> WE WILL bargain collectively upon request with DALLAS GENERAL DRIVERS, LOCAL UNION 745, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive representative of our employees in the appropriate unit concerning the matter of subcontracting work performed by employees in said unit.
>
> The bargaining unit is:
>
> > All truckdrivers, helpers, shipping and receiving clerks, leadmen, forklift operators, and warehousemen, exclusive of all other employees, office clerical employees, guards, and supervisors as defined in the Act.

All our employees are free to become or remain or to refrain from becoming or remaining members of the above-named or any other labor organization.

EMPIRE TERMINAL WAREHOUSE COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6th Floor, Meacham Building, 110 West Fifth Street, Fort Worth 2, Texas (Tel. No. Edison 5-4211, Ext. 2131), if they have any question concerning this notice or compliance with its provisions.

[Dated Mar. 31, 1965]

DECISION AND ORDER

On May 23, 1963, Trial Examiner George A. Downing issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, the General Counsel, Charging Party, and the Respondent filed exceptions to the Intermediate Report together with supporting briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and finds merit in certain of the Respondent's exceptions. Accordingly, the Board adopts the Trial Examiner's findings, conclusion, and recommendations only to the extent consistent herewith.

1. We agree with the Trial Examiner's finding that the Respondent did not violate Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to produce its financial records and other data as requested by the Union. As the Trial Examiner found, the record clearly shows that at no time during negotiations did the Respondent claim that it was

unable to meet the Union's increased wage demands. Indeed, the Respondent agreed that it had a lucrative business, and pointed out that it was not pleading poverty or inability to pay. The Respondent's only position on the wage issue was that it was placed at a competitive disadvantage, and was therefore unable to get more business, because it was paying substantially more in wages than were its competitors. It presented proof of this. The Union not only had independent knowledge of the accuracy of the Respondent's position, but also ignored the presented proof. Under these circumstances, we find that the Respondent did not violate the Act by refusing to produce the financial records requested by the Union.[1/]

2. We further agree with the Trial Examiner's conclusion that the Respondent did not violate Section 8(a)(5) and (1) of the Act by reducing wages on or about August 17, 1962. In this regard, however, unlike the Trial Examiner, we find that the record clearly reveals that the parties had bargained to an impasse on the wage issue before the Respondent effected its proposed wage changes.

On July 13, 1962, negotiations between the parties for a new contract began with the Union's presentation of a complete proposed contract which, *inter alia*, called for a 25-cent per hour across-the-board wage increase for each year of a 3-year term, plus other monetary fringe demands. On July 24, the Respondent presented its counterproposals which, although containing many modifications of the Union's proposals,

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[1/] Cf. *N. L. R. B. v. Truitt Manufacturing Co.*, 351 U. S. 149.

contained no provision for wage rates. The Respondent, however, without specifying the exact amount, clearly informed the Union that it desired to reduce its wage rates (which were approximately 25 percent higher than those of its competitors) in order to maintain its competitive position. Although the Respondent sought to discuss these economic factors, the union negotiator refused to discuss "cost" items until "basic" contractual issues had been worked out. During the following three bargaining sessions (from July 30 through August 6) both sides continued to bargain as to other matters, but the Union remained firm in its refusal to discuss the wage issue and countered the Respondent's request to do so by demanding that the Respondent produce its books and records to prove its inability to pay the wage increase sought by the Union. The Respondent rejected this request and, as indicated above, informed the Union that it had a lucrative business, that it was not pleading poverty or inability to pay, that its position was solely that it was not competitive as regards wages, and that it would not agree to a wage increase but indeed was seeking a wage decrease.

On August 8, 1962, the Respondent by letter to the Union reviewed its position, sought any solutions the Union might have whereby the Respondent might operate more competitively, and proposed to decrease the existing wage rate from $2 per hour to $1.60 per hour effective August 17, 1962, the termination date of the existing contract between the two parties. Thereafter, on August 13, 1962, a union representative met with the Respondent's employees, brought them up to date on

the status of negotiations, and informed them that "we had got to the point where we were more or less at a standstill." The employees voted to reject the Respondent's wage proposal and to strike if Respondent effectuated its proposed wage changes.

Further bargaining sessions were held on August 15 and 16, 1962. Neither the Union nor the Respondent showed any disposition to recede from its respective basic position--the Union demanding a wage increase, and the Respondent insisting on a decrease. Toward the end of the August 16 meeting, the Respondent's representative announced that the Respondent intended to reduce its wage rates, suggested that perhaps during the ensuing negotiations the matter of wages could be worked out, and further suggested that the Union come forward in the future with any solution it might have. At the conclusion of this meeting neither party desired to set a date for a future meeting although both parties indicated a willingness to meet at any time. The meeting ended with the understanding that the parties would meet again "when the spirit moved them." The Respondent instituted its wage decrease on August 17, 1962, and the Union struck the Respondent on September 10, 1962.

In our view, the foregoing record evidence clearly reveals that the issue of wages was the sole impediment to reaching a contract at the time the Respondent placed in effect the wage decrease, and that after the bargaining sessions of August 16 and 17 the parties had arrived at a bargaining impasse on that issue. Moreover, we cannot find, as did the Trial Examiner, that the Respondent's willingness to discuss

the wage issue in the future bars a finding that the parties had negotiated to an impasse. In our view, Respondent's agreement to meet with the Union in the future on the matter of wages reflected nothing more than a recognition of its continuing obligation to meet with the Union. Clearly, such agreement did not remove the wage impasse at which the parties had arrived by August 17.

In addition, we note the argument of the General Counsel and the Union that Respondent unduly delayed proposing its wage reduction by waiting "until the last minute" before making a "first offer" in wages. We find no merit in this contention. The facts show that the Union knew almost from the outset of negotiations of the Respondent's desire for, and its reasons in support of, a wage reduction. The Union, however, for reasons of its own, refused to discuss wages despite the Respondent's repeated requests to do so, until non-cost items were "worked out," and thus, in effect, precluded earlier discussion on this matter. In addition, the record supports the conclusion that the Respondent did not adopt an arbitrary attitude subsequent to specifying the amount of its proposed wage change on August 8, but in good faith was willing to, and did fully, discuss the wage issue with the Union.[2/]

Accordingly, on the basis of the entire record, we find that the Respondent, by reducing its wage rates on August 17, 1962, after bargaining with the Union to an impasse on such a wage reduction, did not thereby violate Section 8(a)(5) and (1) of the Act as alleged in

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2/ *Instrument Division, Rockwell Register Corporation,* 142 NLRB 634, 642.

the complaint.[3/]

3. The Trial Examiner found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting out unit work without notice to, or consultation with, the Union. The Respondent excepted to this finding, and we find merit in the exception.

On September 10, 1962, the Union commenced an economic strike against the Respondent. Within 2 days, all of the strikers, constituting practically all of the Respondent's employees, were permanently replaced. However, the Respondent continued to recognize and bargain with the Union as bargaining representative of both the strikers and their replacements.

The parties met on September 24 and again on September 27. At the September 27 meeting the Union presented its draft of a management rights provision, which was agreed to after the following amendment was added: "The employer reserves the right to subcontract delivery work where past practice has demonstrated such subcontracting to be economically sound."[4/] The parties met again on October 3 and 12,

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[3/] Cf. *N.L.R.B. v. Andrew Jergens Company*, 175 F. 2d 130, 136, (C.A. 9), cert. denied 338 U.S. 827; *Bi-Rite Foods, Inc.*, 147 NLRB No. 11; *Albert Leonard, et al.*, 100 NLRB 1016, 1020. See also *N. L. R. B. v. Katz*, 369 U.S. 736, footnote 12; *N. L. R. B. v. Crompton-Highland Mills*, 337 U.S. 217; *Morand Brothers Beverage Co.*, 99 NRLB 1448, 1465. In view of our finding that the parties had bargained to an impasse as to the issue of wages before the Respondent placed in effect a reduction in wages, we find it unnecessary to consider the Trial Examiner's findings that the Respondent did not violate Section 8(a)(5) even in the absence of an impasse.

[4/] Apparently, the Respondent normally subcontracted various deliveries from the Bengal Street and Amelia Street warehouses, and on occasion used "casual" employees to perform unloading at the main warehouse.

and on October 12 the Union presented a strike settlement proposal calling, in part, for reinstatement of all strikers, restoration of former wages, extension of the old contract for 1 year, increased contributions of 50 cents a week to the health and welfare fund, and a wage increase of 6 cents per hour for all employees 6 months after the execution of the contract. Respondent rejected the proposal, whereupon Union representative Roseborough stated that although the Union hesitated to do so, it would use every means within its power to break the Company.

In the meantime, on October 9, the Union had notified two of the Respondent's customers, A & P and Safeway, of its strike against Respondent, and in its letter also stated:

> It is our intention to employ all legal and legitimate means in conducting a consumer appeal at your stores that sell the products warehoused and distributed by Empire Terminal Warehouse Company. The campaign will be conducted by handbills, and other lawful methods of publicizing our appeals to the consumers. It will be limited to consumer entrances to your stores and away from employee or service entrances.
>
> We do not intend that any of your employees cease working or refuse to handle any product as a result of this campaign. You may wish to post this letter so that your employees will be aware of the purposes of our consumer campaign.

In addition, the Union also notified A & P and Safeway that it intended to picket all delivery trucks of those "allied with Empire."

Thereafter, both A & P and Safeway requested Respondent to make no more deliveries by Respondent's trucks. Accordingly, an arrangement was worked out whereby Respondent contracted out to English City all deliveries it had previously made from its Austin Street Terminal

to A & P and Safeway; and all A & P and Safeway goods which formerly had been picked up at Respondent's dock by contract haulers of A & P and Safeway were thenceforth loaded into boxcars at Austin Street and sent by rail to A & P and Safeway.[5/] The Union did not handbill or picket any A & P or Safeway store.

On December 17, when the Union learned of the subcontracting, it protested Respondent's action and requested the Respondent to discontinue such subcontracting and to restore the work to the employees in the bargaining unit. On December 20, Respondent advised the Union that "There has been no subcontracting other than that discussed with you in negotiations, excepting that forced on the Company by union actions during the strike." However, Respondent indicated a readiness to discuss the matter further if the Union deemed it necessary. On February 21, Respondent again notified the Union that it was anxious to meet and bargain on the subject of subcontracting and on the matter of wages. Finally, on March 12 the parties met, and while taking the position that the amount of subcontracting was minimal and had been necessitated by the Union's correspondence and communication to A & P and Safeway, nevertheless, Respondent agreed to discontinue the subcontracting. Although all such subcontracting was thereafter discontinued, the strike, nevertheless, still continued as of the time of the hearing.

[5/] Although this arrangement reduced the workload of its employees, apparently Respondent did not reduce its workforce, but had the employees performing other work. Nevertheless, the Respondent appears to admit that this subcontracting did reduce the workday at least 1 hour.

In finding that the Respondent's unilateral subcontracting was violative of Section 8(a)(5), the Trial Examiner relied on the Board's findings in *Town & Country,* [6] *Fibreboard,* [7] and *Hawaii Meat.* [8] In addition, the Trial Examiner concluded that the unlawful subcontracting converted the economic strike into an unfair labor practice strike. On the other hand, the Respondent contends, *inter alia*, that the facts in those cases relied on by the Trial Examiner are clearly distinguishable from the facts herein presented, and that the subcontracting in the instant case was not a permanent change in its business operations, but was only a stopgap measure necessitated by the Union's strike activities. The Respondent further contends that the subcontracting neither caused harm to the unit employees nor altered the composition of the bargaining unit. Therefore, the Respondent argues, it did not refuse to bargain in good faith by unilaterally subcontracting this small portion of unit work to English City as a stopgap measure to continue serving its customers during the strike, and that the complaint alleging such violation should be dismissed. We agree.

As we recently stated, the principles of those cases relied on by the Trial Examiner were not meant to be hard and fast rules to be

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6/ *Town and Country Manufacturing Company, Inc.* , 136 NLRB 1022, enfd. 316 F. 2d 846 (C.A. 5).

7/ *Fibreboard Paper Products Corp.* , 138 NLRB 550, enfd. 322 F. 2d 411 (C.A.D.C.), affirmed 379 U.S. 203.

8/ *Hawaii Meat Company, Ltd.* , 139 NLRB 966, enforcement denied 321 F. 2d 297 (C.A. 9).

mechanically applied irrespective of the circumstances of the case.[9] Moreover, we recently held that an employer was not under a duty to bargain over temporary subcontracting necessitated by a strike where such subcontracting did not transcend the reasonable measures necessary in order to maintain operations in such circumstances.[10] Applying those guidelines recently set forth by the Board to the facts of the instant case, we find that Respondent's subcontracting in issue herein did not violate its statutory bargaining obligation.

Thus, the record here clearly shows that the subcontracting was prompted, not by the Respondent's desire to have others do work which employees in the unit had been performing, but by the request of the Respondent's customers, and that the Respondent instituted the subcontracting arrangement solely as a stopgap or temporary measure in order to continue its business relationship with these customers. This latter fact is evidenced by the Respondent's good-faith bargaining throughout the entire period of the dispute. In this regard, it is to be noted first that, although all of the strikers, who constituted virtually all of the Respondent's employees, had been permanently replaced several months prior to, and for reasons other than, the subcontracting, the Respondent continued to recognize the Union as bargaining representative of both the strikers and their replacements. In addition,

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[9] *Westinghouse Electric Corporation (Mansfield Plant)*, 150 NLRB No. 136; *Shell Oil Company*, 149 NLRB No. 26.

[10] *Shell Oil Company*, 149 NLRB No. 22; *Shell Chemical Company, a Division of Shell Oil Company*, 149 NLRB No. 23.

the Respondent sought not to undercut the Union, but instead offered on December 20, 1962, and again on February 21, 1963, to meet and bargain with the Union on the subcontracting issue. The Union, however, did not accept these offers, and it was not until March 12, 1963, that a meeting took place between the parties, at which time the matter was discussed and an agreement reached to discontinue the subcontracting. Finally, the Respondent did not, despite the subcontracting, eliminate, permanently or otherwise, any unit jobs or otherwise alter or impair the bargaining unit, and the subcontracting here did not exceed what was necessary to protect Respondent's customers whose deliveries were in jeopardy.

Accordingly, as we find in the circumstances of this case that the Respondent did not violate Section 8(a)(5) of the Act by unilaterally subcontracting the work in issue, we shall also dismiss this allegation in the complaint.[11/]

11/ *Shell Oil Company*, 149 NLRB No. 22; *Shell Chemical Company, a Division of Shell Oil Company*, 149 NLRB No. 23. See also *Westinghouse Electric Corporation (Mansfield Plant)*, *supra*.

Based on his findings that the September 10 strike was an economic strike and that the Respondent's subsequent subcontracting was unlawful, the Trial Examiner further found that this unlawful action converted the strike into an unfair labor practice strike. The Trial Examiner concluded, however, that the conversion did not give the strikers any reinstatement rights because such rights had been lost when the strikers were lawfully replaced prior to the conversion. Inasmuch as we have found that the subcontracting was not unlawful, we also find, contrary to the Trial Examiner, that the economic strike was not converted into an unfair labor practice strike and that the economic strikers lost their reinstatement rights simply because they were replaced.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 31, 1965

Frank W. McCulloch, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

BRIEF FOR PETITIONER

In the

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,265

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 745,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

EMPIRE TERMINAL WAREHOUSE COMPANY
Intervenor.

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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REILLY PUBLISHING COMPANY — 1710 S. HARWOOD — DALLAS, TEXAS — HA 8-8785

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board erred in finding that the Company did not violate Section 8(a)(5) and (1) of the Act by reducing wages on or about August 17, 1962.

2. Whether the Board erred in finding that the parties had arrived at a bargaining impasse after the collective bargaining session of August 16, 1962.

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ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR PETITIONER

Jurisdictional Statement

Petitioner, is a local union affiliated with the International Brotherhood of Teamsters, and was the charging party before the National Labor Relations Board. It now seeks review of an unfavorable decision and order of the Board and is an aggrieved party under Sec. 10(f) of the National Labor Relations Act. This Court has jurisdiction under Sec. 10(f) of the Act, 29 U.S.C. Sec. 160(f).

The respondent below, Empire Terminal Warehouse Company, has been permitted to intervene in this proceeding.

Statement of the Case

The union asserts that the employer refused to bargain by instituting over union protest wage reduction at time of contract expiration.

The union and employer for a number of years had engaged in amicable collective bargaining (J.A. 36). With their current contract due to expire on August 16, 1962, the union, on June 7, gave notice of reopening and requested bargaining negotiations (See App. p. 17). Two weeks later this request was acknowledged by the employer's attorney who suggested a meeting to be held sometime after June 29th (See App. p. 18).

After this exchange of correspondence the collective bargaining negotiations followed the chronology below:

7/13/62—The first bargaining session; the union presented its contract proposal. The proposal was simply the renewal of the existing contract with an immediate 25c per hour wage increase, a 50c per week increase in health and welfare contribution, and two minor contractual modifications. (J.A. 6, 8, 9, 26; 75) There was no discussion of these proposals at this meeting, as

the employer "wanted to take it and study it, and they'd see us later." (J.A. 10)

7/24/62—At the second bargaining session the company presented a detailed counterproposal containing substantial modifications of the existing contract, *but no wage proposal.* The modifications included elimination of check-off (J.A. 62), institution of lie detector tests (J.A. 13), extension of probationary period for new employees (J.A. 12), and modifications in such areas as management rights (J.A. 11), seniority (J.A. 12), and promotions (J.A. 12). Negotiations centered on the company's proposed modifications (J.A. 11). As to wages the company stated simply "that it could see no reason why it should pay more than its competitors" (J.A. 57), and the union said it would not sign a contract without wage benefits for its members (J.A. 58).

7/30/62—The company had still presented no wage proposal, negotiations again centered on their proposed modifications of the old agreement (J.A. 30). The union and company reiterated their previous positions on wages (J.A. 58).

8/ 1/62—A number of issues being unresolved, the union suggested that the parties seek the assistance of the Federal Mediation and Conciliation Service (J.A. 15). During

the meeting Schoolfield asked the union for a wage proposal and the union replied that they had already made a proposal and "thought the next move was up to the company" (J.A. 15). The employer rejected the union's request to inspect the company's financial records (J.A. 16).

8/ 6/62—Although the employer had still made no wage proposal, the union did agree "to hold a meeting with their membership to see if they would come off of the 25c per hour [increase] that they had requested before" (J.A. 59). The union still sought the 50c per week increase in health and welfare contribution, proposing a 60 day extension of the contract at the current wage rates and the increased contribution (J.A. 19). The employer was to give the union an answer on the proposed extension at an early date. (J.A. 19)

8/ 8/62—The employer wrote the union stating: (J.A. 69)

> "Please be advised that the company's wage proposal in the negotiations for a new contract is $1.60 per hour across-the-board for all classifications."[1]
>
> * * *
>
> "Because of . . . competitive neces-

[1] A reduction of 40c and 55c per hour in the existing contractual wage rates (JA27).

> sities . . . the company proposes to put in force and effect its wage proposals of $1.60 per hour . . . as of August 17, 1962."

At the time this letter was received there were no meetings on schedule, the union called the employer and meetings were set for August 15th and 16th (J.A 20).

8/15/62—The union agreed to present a modified seniority proposal the following day. Negotiations continued and the employer again refused the union's request for financial data. (J.A. 21)

8/16/62—The union presented a modified seniority proposal that was accepted by the employer as satisfactory (J.A. 27). The union proposed a 60-day extension of contract at current contract rates and no increase in health and welfare. (J.A. 26) This was rejected by the employer.

Before the conclusion of this meeting, the union, for the first time in negotiations, proposed a new contract with no wage increase in existing rates and a starting rate for new employees lower than the present contract rates (J.A. 29, 30). The company rejected this proposition stating at one point that it would "go ahead and put their wage decrease in effect and per-

haps in following subsequent negotiations perhaps we can work the matter of wages out" (J.A. 42). Negotiations concluded on the 16th with no agreement, and the company, over union objection, instituted the wage reduction the following day. (J.A. 80-81).

The foregoing summary of the negotiations is based upon undisputed testimony in the record before the Court.

The NLRB Proceedings

Unfair labor practice charges filed by the union resulted in a complaint alleging a breach of bargaining duty with respect to the employer's institution of the wage reduction and his refusal to furnish financial data in support of the demanded decrease (J.A. 66), alleging that the subsequent strike was caused by these unfair labor practices.

The Trial Examiner dismissed the complaint. He reasoned that the employer's only obligation was to give notice of intention and opportunity to consult before institution of the wage change (J.A. 91). The Examiner rejected the contention that *impasse* was a prerequisite to the institution of the change (J. A. 92), finding, however, "there was no *impasse* on the wage issue" at the conclusion of the August 16th meeting (J. A. 91).

Exceptions were taken by the General Counsel and the union and the Board dismissed the com-

plaint, adopting the Intermediate Report in most respects. The Board, however, overturned the Trial Examiner's finding of no *impasse*, and concluded that in fact an *impasse* had existed which warranted the unilateral wage reduction. By finding *impasse* the Board pretermitted the question of whether a bona fide *impasse* is a prerequisite to unilateral institution of changes in wages and conditions of employment. (J.A. 113)

Statutes Involved

Sec. 8(a) (5) of the National Labor Relations Act, 29 U.S.C. Sec. 158 provides:

> "Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Sec. 9(a).

Sec. 8(d) of the Act provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a

proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . ."

Statement of Points

1.

The Board erred in concluding that the Respondent's unilateral reduction in wages did not constitute a refusal to bargain in violation of Sec. 8(a)(5) of the Act.

2.

The Board erred in finding that a bargaining impasse existed at the conclusion of the bargaining negotiations of August 16, 1962.

Summary of Argument

The unilateral wage reduction, in absence of a bona fide bargaining impasse, constituted a refusal to bargain.

The Board's finding of impasse is not supported by the record, but rather is predicated upon a mistatement of the undisputed testimony, i.e., the Board found, contrary to the record, that the union never indicated a willingness to recede from its demanded wage increase.

There could have been no bona fide impasse at the conclusion of the August 16th bargaining negotiations because the employer had repeatedly refused to produce financial records to support its demanded wage decrease.

Argument

Unilateral Change in Conditions of Employment Before Impasse Violates Bargaining Duty

It has been assumed for some time that a bargaining impasse warranted otherwise unlawful unilateral action. *Cf. NLRB vs. Intercoastal Terminal,* 286 F. 2d 954 (5th Cir. 1961). Until recently the truth of the converse has been only implied.[2] Within the past month, however, the Board has held unlawful a unilateral wage reduction on the ground it occurred before impasse.[3] *Boulevard Storage & Moving Company,* 152 NLRB No. 51. Because of the pertinence of the decision and the unavailability of the printed reports, the full text is reprinted in the appendix beginning at page 20.

The unilateral wage reduction by Empire Terminal violates Sec. 8(a) (5) if there was no bargaining impasse at the conclusion of the negotiating session of August 16th, the session immediately preceding the wage reduction. The argument that follows urges that the Board erred in overruling the Trial Examiner's conclusion that the parties were not at impasse on August 16th.

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[2] See Collins, *Unilateral Changes In Terms And Conditions Of Employment At Contract Termination,* Proceedings of New York University Seventeenth Annual Conference on Labor (BNA 1964). Professor Collins argues that a fair reading of *NLRB vs. Katz,* 369 U.S. 736 (1962) "reveals that the court regarded impasse as the division line between lawful and unlawful changes during bargaining." *Id* at 150. Compare *NLRB vs. Tex-Tan, Inc.,* 318 F. 2d 472, 482 (5th Cir. 1963); *Felzer Television vs. NLRB,* 317 F. 2d 420, 422 (6th Cir. 1963).

[3] This position had been hinted at in earlier decisions. *Cf. Comfort Springs Corp.,* 143 NLRB 906, 913 (1963).

The Absence of Impasse on August 16th

The existence of impasse may well be a "fact" issue, but it implies legal issues as well:

> "Certainly whether the parties have reached a deadlock in negotiations is a factual matter, but whether such a deadlock legally justified a unilateral alteration in the conditions of employment is, at the very least, a mixed question of law and fact." *I.U.M.S.W.A. vs. NLRB*, 320 F. 2d 615, 622 (3rd Cir. 1963).

Whatever the characterization, it is the proper function of a reviewing court "to reject a conclusion of the Board which disregards or fails to give proper cognizance to uncontradicted or well established facts." *NLRB vs. Winona Textile Mills,* 160 F. 2d 201, 208 (8th Cir. 1947), a court cannot uphold a Board decision that ignores uncontradicted evidence, *NLRB vs. United Brass Works, Inc.,* 287 F. 2d 689, 691 (4th Cir. 1961).

Impasse is that "hardening in the attitude of the negotiators" that renders further negotiations futile. *Bradley Washfountain,* 89 NLRB 1662, 1664 (1950).[4] In *Katz* the Supreme Court recognized that "a continued willingness to negotiate" is totally inconsistent with any notion of impasse. *NLRB vs. Katz,* 369 U.S. 736, 741 (n. 7). Similarly the Fifth Circuit has held impasse to be that point "when both parties had concluded that there was no

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[4] Enforcement denied, *NLRB vs. Bradley Washfountain,* 192 F. 2d 144 (7th Cir. 1951).

further reasonable prospect of reaching agreement." *NLRB vs. Intercoastal Terminal,* 286 F. 2d 954, 958 (5th Cir. 1961).

Undoubtedly it was this analysis of impasse that caused the examiner to conclude that:

> . . . "As further bargaining was plainly contemplated at the time, [August 16] there was no impasse on the wage issue, which was alone the real impediment at the time to reaching a contract." (J.A. 91).

The Board rejected this conclusion of the examiner[5] concluding:

> ". . . that the issue of wages was the sole impediment to reaching a contract at the time the respondent placed in effect the wage decrease, and that after the bargaining sessions of August 16th and 17th the parties had arrived at a bargaining impasse on that issue." (J.A. 111).

The Board's finding of impasse is predicated upon the following summary of the events of the 16th:

> "Neither the union nor the respondent showed any disposition to recede from its respective basic position—*the Union demanding a wage increase* and the Respondent insisting on a decrease." (J.A. 111, emphasis added)

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[5] As this Court has held "Where there has been some contrariety of opinion between the Board and the Trial Examiner . . . the evidence must be examined with greater care than when both the Board and the Trial Examiner are in complete agreement." *Joy Silk Mills vs. NLRB,* 87 U.S. App. D. C. 360, 185 F. 2d 732, 742 (1950).

The uncontradicted testimony is that the union, during the August 16th negotiations, not only modified its seniority proposal (J.A. 27) and modified its demand for a 50c per week increase in health and welfare contribution (J.A. 26) but for the first time indicated a willingness to sign a new agreement with no wage increase whatsoever and providing, in effect, a wage reduction by establishing a lower starting rate for new employees.[6]

The Board's finding of impasse is grounded upon a serious misconception of the record—i.e., that the union showed no "disposition to recede" from its demanded wage increase. There is no testimony in the record to support this conclusion. The uncontradicted testimony[7] is that the union, for the first time, during the August 16th negotiations indicated a willingness to forego entirely any wage increase. During the same negotiations the employer expressed a view that "the matter of wages

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[6] On the 16th of August, Mr. Roseborough, you proposed a rate range as I understand it, is that correct?
A. I asked the Company if we could work out something on the rate range.
Q. Now, I think you described it would mean that new employees would start below the current contract rate, I believe you said?
A. That's right.
Q. And that the existing employees would remain at their present rate, is that correct?
A. That's right.
Q. The question I have then, was this proposal made limited to the contract extension, or was it with respect to entering into a new contract?
A. It was with the contract extension with the thought in mind—no, at that time I would have been willing to settle on that basis subject to the total (sic) of the men. Of course I advised the Company I had no authority to go beyond what I had asked for, but that I thought we could probably work it out.
Q. With respect to simply an extension of the contract or with respect to a new contract?
A. With respect to a new contract. (JA29)

[7] See also J.A. 42, 106.

could be worked out" in "ensuing negotiations" (J.A. 80). Not only were the parties willing to negotiate, but both evinced a flexibility that might well have produced agreement in future negotiations. This flexibility was later destroyed by the employer's unilateral wage reduction, and the ensuing strike.

There was no bona fide impasse on August 16th for one further reason. The employer had, by that date, repeatedly refused to produce financial records to support its demanded wage decrease. (J.A. 77). It seems impossible to reconcile the *Boulevard Storage* decision (App. p. 20) with the instant decision.[c] The Board there held:

> "That the act requires an employer engaged in collective bargaining to produce substantiating data, at the request of a union, where the employer . . . takes a position that it is compelled to cut wages . . ." (App. p. 24)

This is, of course, the position adopted by the respondent Empire Terminal. The Board, in analyzing the legality of the wage cut, in *Boulevard,* concluded that it was a violation:

> "Although there were differences in the respective wage demands of the parties, it must be held that the Respondent's refusal to submit all relevant data contributed significantly to any deadlock in negotiations which may have existed at that time. This conduct on the part

[c] Board Member Jenkins had similar difficulty for his dissent in *Boulevard cites Empire Terminal* (App. p. 33).

> of Respondents precluded any harmonious resolution of the wage dispute that might have taken place had meaningful bargaining been fostered by the furnishing of such data. It may well be that such data would have persuaded the union to modify its wage demands to a point which would have appeared more reasonable to Respondents or the union might have been able to convince Respondents that its proposed wage hike could be absorbed. Consequently, there was no good-faith impasse between the parties to warrant Respondent's unilateral action." (See App. p. 26).

In entering the pre-hearing stipulation we indicated we would not assert that the refusal to produce financial records was an independent violation of the Act, (J.A. 1). However, in light of the *Boulevard* decision Petitioner does desire to argue that respondent's refusal to produce the data should be considered in evaluating the existence of a bona fide impasse.

The Board's finding that the August 17th wage cut was justified by the August 16th impasse is not sustained by the record.[9]

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[9] For some reason an overzealous decision writer included in the Board Order:

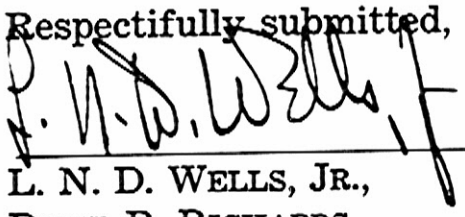
> "The Union, however, for reasons of its own, refused to discuss wages despite the Respondent's repeated requests to do so, until non-cost items were "worked out", and thus, in effect, precluded earlier discussions on this matter." (JA 112)

This finding is simply a creature of the imagination, presumably based on Roseborough's testimony regarding the August 6th meeting (J.A. 17) at a time when the employer had still refused to make a written wage proposal (J.A. 17).

Conclusion

The wage reduction before impasse violated respondent's bargaining obligation. The Board Order should be set aside and the case remanded to the Board for reconsideration on the basis of the entire record.

Respectfully submitted,



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1601 National Bankers Life Building,
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1009 Tower Building
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APPENDICES

APPENDIX 1

June 7, 1962

Mr. Jack Huntington
Empire Terminal Warehouse
721 South Austin
Dallas, Texas

Dear Sir:

Please accept this as official notice that the Dallas General Drivers, Warehousemen and Helpers Local Union No. 745 wishes to open its Agreement with your Company covering Checkers and Leadmen, Order Fillers, Drivers, Warehousemen who are working under the jurisdiction of this Local Union.

It is our desire that we meet with you as early as possible so that we may be able to reach an agreement on or before August 17, 1962.

Yours very truly,

W. L. Piland
Secretary-Treasurer
and Business Manager

WLP:AW
Certified Mail
Return Receipt Requested No. 750040

APPENDIX 2

Law Office
Allen P. Schoolfield, Jr.
1200 Republic National Bank Bldg.
Dallas 1, Texas

RIverside 1-6149

June 22, 1962

Mr. W. L. Piland
Secretary-Treasurer and Business Manager
Dallas General Drivers, Warehousemen & Helpers
Local Union No. 745
1727 Young Street
Dallas, Texas

Dear Mr. Piland:

This will acknowledge receipt of your letter of June 7 advising that the contract and agreement between your union and Empire Terminal Warehouse is open for negotiations.

Mr. Jack Huntington of Empire Terminal who generally handles these matters along with myself for the company, is on vacation until June 29. I therefore request that you examine your schedule and advise me of the date after June 29 when a meeting would be convenient. If you so desire, you could

submit your contract to us in advance in order that we may study it prior to the first meeting.

Sincerely,

Allen P. Schoolfield, Jr.
Attorney for Empire Terminal
Warehouse

APS Jr/jaf
cc: Mr. Lester Ackerman
Mr. Jack Huntington

APPENDIX 3

Boulevard Storage & Moving Co., Inc., Irving Kirsch Corporation, United Fire Proof Warehouse Co., Walsh Packing & Storage Co.

and

Chauffeurs, Teamsters & Helpers "General" Union Local 200, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

DECISION AND ORDER

On November 30, 1964, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondents had not engaged in certain unfair labor practices as alleged in the complaint, and recommending that the complaint be dismissed in its entirety, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the General Counsel and the Union filed exceptions to the Trial Examiner's Decision and supporting briefs. The Respondent United filed an answering brief.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are

hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the Respondent's answering brief, and the entire record in this case, and hereby adopts the Trial Examiner's findings and conclusions only to the extent consistent with this Decision and Order.

Contrary to the Trial Examiner, we find that the Respondents violated Section 8(a)(5) and (1) of the Act by failing to produce certain financial data requested by the Union during collective-bargaining negotiations and by unilaterally reducing wages.

The Respondents, individually referred to as Boulevard, Kirsch, United, and Walsh, are engaged in local and over-the-road hauling of household furniture. Since 1955, the Union has been in contractual relations with the Respondents covering all employees, including local and over-the-road drivers; since 1961, Respondents have bargained as a multiemployer group with the Union covering such employees. In January and February 1964, during collective-bargaining meetings to negotiate a contract to succeed the one which was due to expire February 29, 1964, the Union proposed a wage increase for all employees and the Respondents counterproposed a 19-cent per hour reduction in wages. Respondents claimed that the local moving phase of their operations was not making any profit and that it was unable to stay competitive with the many nonunion moving companies in the area. Respondents' spokesman advised the Union of the unprofitable local moving situation by comparing the hourly charge to customers ($4.50 per hour)

with the labor cost ($2.64 hourly wage rate plus $.58 fringe benefits) which amounted to 71 percent of the charge to customers, and the general overhead cost of 29.6 percent in the industry. The Union's chief negotiator, Henry Kucera, asked to see the Respondents' financial records pertaining to their overall operations, including the over-the-road hauling, but was willing to accept the records of any one of the Respondents for the purpose of determining "financial plight." Respondents rejected this request on the ground that the overall information was immaterial in the circumstances.

Additional meetings were held between March 10 and May 25, 1964. On March 10, the Respondents offered to reduce their proposed wage cut from 19 cents to 15 cents an hour. This proposal was unacceptable to the Union and the Respondents advised the Union that the 15-cent cut would nevertheless be put in effect on March 15. The Union threatened strike action and the meeting ended. Wages of all employees of the Respondents, including those engaged in over-the-road hauling, were cut 15 cents per hour effective the following week.

The parties next met on April 7. The Union again requested examination of the Respondent's books relating to sales, costs, and earnings, and repeated the request in a letter to the Respondents on the following day. The Respondents replied by letter, repeating their cost figures as to local moving, complaining about the extent of nonunion competition, and maintaining that these matters did not require an audit of books for verification. At a

meeting held on April 23, the Respondents finally agreed they would supply overall financial data of the four companies upon devising some means for preserving the confidentiality of the records. However, the employees went on strike on May 14 and no records were ever furnished. The strike had been authorized by the employees of all four companies at a meeting held on May 3, after the employees, concerned about the wage cut, had been informed by the Union's bargaining committee of its failure to obtain access to the financial records of the Respondents.

A final meeting was held on May 25, when the Respondents offered to reinstate the wage rates of the expired contract, but the Union continued to request a wage increase. A few days later, the Union reached a separate settlement agreement with Kirsch, providing for the retroactive restoration of the 15-cent wage cut and a 20-cent wage increase spread over the next 3 years. Thereafter, the group bargaining arrangement among the three remaining Respondents was formally dissolved. Boulevard and Walsh then entered into agreements with the Union on the same terms accepted by Kirsch. United alone has not reached an agreement with the Union and its employees were still on strike at the time of the hearing.

1. *The failure to produce data.* We agree with the Trial Examiner that the Act requires an employer engaged in collective bargaining to produce substantiating data, at the request of a union, where the employer pleads financial inability to

pay a proposed wage increase[1] or takes a position that it is compelled to cut wages,[2] and that an employer's claim that it could not grant an increase and remain competitive so as to avoid losses is equivalent to a plea of inability to pay.[3] However, we do not agree with his conclusion to the effect that these Respondents made no such plea of inability to grant a wage increase as entitled the Union to examine more than the records relating to local moving costs, which records, the Trial Examiner found, "the Companies substantially disclosed."

With respect to the nature of Respondents' position taken during negotiations, the record shows that, at the first meeting on January 22, Respondents' reply to the Union's proposed wage increase for all employees was that it could not be granted, according to the testimony of Thomas Neubauer of the Respondents' negotiating committee, because of the "very severe competitive and economic problems we were confronted with" concerning local hauling. At this meeting and at several subsequent ones, the Respondents rejected the Union's wage demands and countered with a proposed wage cut on the ground that unless an overall cut was made, they could not become competitive in their local moving as to which they were assertedly losing money. Manifestly, this was a plea of inability to

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[1] *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149.

[2] *Celotex Corp.*, 146 NLRB No. 8.

[3] *Peerless Distributing Co.*, 144 NLRB 1510, 1514; *Cincinnati Cordage and Paper Co.*, 141 NLRB 72, 77.

take any action with respect to wages except to reduce them, albeit grounded upon the asserted necessity for economic relief in one phase of Respondents' operation, such as called for the furnishing of substantiating data by one bargaining in good faith.

Respondents' offer to certain local moving data scarcely suffices to satisfy this obligation. To adopt a contrary view would be to sanction Respondents' efforts to isolate their local moving from their total operations and to regard their dispute with the Union, which related to the wage rates of all employees, as confined to the local moving phase of their business. But this would be wholly unrealistic as local moving data alone would not permit of an intelligent evaluation of Respondents' declared necessity for an overall wage cut. For as already indicated, the Union was the bargaining representative of all employees of Respondents and not of the local drivers only, and it was engaged in bargaining for all the employees it represented. The wage increase requested by the Union was for all the employees and the wage cut which Respondents proposed and later instituted also affected all the employees. Clearly, local moving data alone would have shed little light on Respondents' financial status in regard to the bargaining proposals affecting the overall complement.[4]

Upon the entire record, we find that Respondents,

[4] With respect to the local moving data which was provided, the general industry overhead cost figure of 29.6 percent was not, of course, the precise overhead costs of these Respondents.

by refusing to furnish the Union with the overall financial data requested, failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

2. *The wage cut.* Having found that the Respondents' failure to produce records during bargaining negotiations was an unfair labor practice, we also find, in the circumstances, that a *bona fide* impasse did not exist as of March 10, when the wage cut was announced. Although there were differences in the respective wage demands of the parties, it must be held that the Respondent's refusal to submit all relevant data contributed significantly to any deadlock in negotiations which may have existed at that time. This conduct on the part of Respondents precluded any harmonious resolution of the wage dispute that might have taken place had meaningful bargaining been fostered by the furnishing of such data. It may well be that such data would have persuaded the Union to modify its wage demands to a point which would have appeared more reasonable to Respondents or the Union might have been able to convince the Respondents that its proposed wage hike could be absorbed. Consequently, there was no good-faith impasse between the parties to warrant Respondents' unilateral action.[5] We find that the Respond-

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[5] *Bethlehem Steel Company (Shipbuilding Division)*, 147 NLRB No. 151. The Trial Examiner has noted that if Respondents' failure to furnish the data required herein were an unfair labor practice, "I should agree that the 'impasse' of March 10 did not warrant the companies' action in instituting a wage cut; the 'impasse' would have been occasioned, at least in part by the unfair labor practice."

ents also violated Section 8(a)(5) and (1) of the Act by instituting the wage cut.

3. *The strike.* The complaint alleges that the strike, which began on May 14, 1964, was caused and prolonged by Respondents' unfair labor practices. We find that this allegation has been sustained, as the record shows that the strike was caused or prolonged in part by the Respondents' unlawful refusal to furnish financial data and their unlawful wage cut.[6] Consequently, the striking employees are entitled to reinstatement upon application.

The Effect of the Unfair Labor Practices Upon Commerce

The unfair labor practices of the Respondents set forth above, occurring in connection with the operations of the Respondents, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

We have found that the Respondents have engaged in unfair labor practices, but the General Counsel, with the Union's approval, has requested

[6] The Trial Examiner found that "If either the wage reduction or the refusal to produce the books is held an unfair labor practice, the strikers are 'unfair labor practice strikers' as the strike was caused or prolonged by an unfair labor practice."

that a remedial order be issued only against Respondent United, as settlement agreements have been reached between the Union and the other three Respondent companies. In the circumstances herein, we shall honor this request.

Having found that Respondents refused to bargain with the Union in violation of Section 8(a) (5) and (1) of the Act by refusing to furnish financial records as to their overall operations, and by unilaterally cutting wages, we shall order Respondent United, who is no longer engaged in group bargaining with the other employers, to supply such information as to its operations, to restore the wage rates that existed prior to its unilateral action, and to make whole each of its employees, with interest at 6 percent per annum, for any loss of pay each may have suffered as a result of the wage cut.

Having also found that the striking employees are unfair labor practice strikers, and as the record does not establish that the employees of Respondent United have abandoned the strike or are unavailable for reemployment, we shall order that Respondent United offer the strikers reinstatement to their former or substantially equivalent positions, upon application therefor, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employees hired after May 14, 1964, the day the strike started, to replace the striking employees. We shall also order that United make whole those strikers who are entitled to reinstatement for any loss of pay they may suffer

by reason of United's refusal, if any, to reinstate them, upon request, by payment to each of them of a sum of money equal to that which he normally would have earned as wages, with interest at 6 percent per annum, during the period beginning 5 days after the date on which he applies for reinstatement and terminating on the date of United's offer of reinstatement, such loss to be computed in the manner set forth in F. W. Woolworth Company, 90 NLRB 289.

Conclusions of Law

1. Respondents are engaged in commerce within the meaning of Section 2(2) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to bargain in good faith with the Union, the Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, United Fire Proof Warehouse Co., Milwaukee, Wis-

consin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Chauffeurs, Teamsters & Helpers "General" Union Local 200, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of its employees in the appropriate unit, by refusing to furnish financial records dealing with its overall operations, and by instituting unilateral changes in wages or other terms or conditions of employment.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the aforesaid Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all of such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which it is found will effectuate the purposes of the Act:

(a) Upon request, provide the Union with financial records pertaining to its overall operations.

(b) Revoke the unilateral wage changes instituted on March 15, 1964, and revert to the wage rates existing immediately prior thereto.

(c) Make whole its employees for any loss of pay they may have suffered by reason of the unilateral wage changes, in the manner set forth in this Decision and Order.

(d) Upon application, offer to its striking employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole, if necessary, in the manner set forth in this Decision and Order.

(e) Notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(f) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to determine the amount of backpay due and the rights of reinstatement under the terms of this Order.

(g) Post at its plant in Milwaukee, Wisconsin, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Thirtieth Region, shall, after being duly signed by a representative of the Respondent, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for the Thirtieth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C.

John H. Fanning, Member

Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

Member Jenkins, dissenting:

I cannot agree that the Respondent's implementation of a 15c wage cut on March 15, 1964, constituted a refusal to bargain in light of Respondent's negotiations thereon in meetings on January 22,

February 7, 19, and March 2, and 10, 1964. I agree with the Trial Examiner's conclusion that an impasse had been reached at the March 10th meeting based as it was on the wide difference between the parties on their respective wage proposals, and the fact that the federal mediator involved had advised the Employers that "he felt the entire situation was hopeless" that they "were awfully far apart and probably couldn't arrive at any solution to our problems," and that they had "reached a stalemate." At the time the March 10 meeting disbanded, the parties had made no arrangements to meet further. The Supreme Court has recently found a similar factual situation was an impasse.[7]

Nor does the Respondent's failure to produce financial data about the profitable portion of its operations, over-the-road-trucking, constitute a refusal to bargain. As the Trial Examiner succinctly stated:

> But the Union has no inherent right to such records. If, for example, an employer grounds his refusal to give an increase on a sheer reluctance to pay employees more money, the Union cannot compel him to produce his books to support its contention that he can afford to pay more. So here, the companies' position

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[7] *American Shipbuilding Company v. N.L.R.B.*, 380 U.S. 300, in which the Supreme Court found an impasse when "after extended negotiations, the parties separated without having resolved substantial differences on the central issues dividing them and without having specific plans for further attempts to resolve them—a situation which the Trial Examiner found was an impasse."

In connection with the wage increase, compare *N.L.R.B. v. Crompton-Highland Mills*, 337 U.S. 217, and *N.L.R.B. v. Katz*, 369 U.S. 736. See also *Empire Terminal Warehouse Co.*, 151 NLRB No. 125.

that because of local moving competition they wanted to reduce labor costs may have been a *non sequitur*, in the sense that it was an insufficient reason for a wage cut, but it did not entitle the Union to examine any general records of profitability, except only those relating to local moving costs, and those the Company substantially disclosed.

Secondly, the Companies and the Union were in the process of working out some means of producing the records when the Union struck and at this point the matter was abandoned. The overall context of this case clearly establishes that the parties, who had for years previously been involved in strike disputes over wages, were in substantial disagreement over wage proposals and the strike which resulted was simply an economic strike.

I would, therefore, affirm the Trial Examiner's dismissal of the complaint.

Dated, Washington, D. C.

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Howard Jenkins, Jr. Member
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,265

DALLAS GENERAL DRIVERS, LOCAL UNION 745, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

EMPIRE TERMINAL WAREHOUSE COMPANY, INTERVENOR

On Petition to Review an Order of the National Labor Relations Board

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STATEMENT OF QUESTIONS PRESENTED

The stipulated issues are correctly stated in petitioner's brief, and appear on p. 1 of the Joint Appendix.

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AUTHORITIES CITED

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Dallas General Drivers, Local Union No. 745, International Union of Teamsters, Chauffeurs, Warehouse-

men and Helpers of America ("the Union") to review and set aside an order of the National Labor Relations Board, issued on March 31, 1965, after the usual proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The Board, in its order dismissed a complaint which issued against Empire Terminal Warehouse Company ("the Company") upon charges filed by the Union. The Board's Decision and Order (J.A. 108-119)[1] are reported at 151 NLRB No. 125. This Court has jurisdiction under Section 10(f) of the Act.

I. The Board's Findings of Fact

In dismissing the complaint alleging violations by the Company of Section 8(a)(5) and (1) of the Act, the Board found that the Company did not act unlawfully by refusing to produce its financial records and other data demanded by the Union during bargaining negotiations; by reducing wage rates after the parties had bargained to an impasse concerning rates to be effective under the new labor contract; and by temporarily subcontracting work during a strike, which was normally performed by employees in the bargaining unit.[2] The evidence upon which the Board's findings are based is summarized below.

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[1] "J.A." references are to pages of the joint appendix; occasional references to exhibits not reproduced in appendix are designated "G.C. Exh." and "Resp. Exh.", respectively.

[2] The propriety of the Board's finding that respondent did not violate Section 8(a)(5) by its action in subcontracting work is not challenged here by the Union.

A. *Background: the first 1962 bargaining negotiations*

The Company is engaged at Dallas, Texas, in furnishing storage and truck delivery services [3] (J.A. 73; 5, 66-67). The Board certified the Union in 1956 as the bargaining representative of the Company's truck drivers, helpers, shipping and receiving clerks, and warehousemen, among other groups [illegible] the Company and the Union have had contractual relations since that time (J.A. 74, 98; 5, 7, 67-68). The last agreement between the parties was due to expire on August 17, 1962, and bargaining negotiations looking to a new contract began on July 13, 1962 (J.A. 74, 109; 7).

On that date, the Union presented a complete proposed contract, which, among other things, called for a 25-cent per hour across-the-board wage increase for each classification in each contract year, and an additional increase for drivers whose wage rate in the third year would be 90 cents higher than the existing rate of $2 per hour (J.A. 75, 109; 9 G.C. Exh. 2, Appendix A). The Union also proposed an increase in the Company contribution to the Union's health and welfare fund of 50 cents per employee per week (*Ibid.* and G.C. Exh. 2, XIX). At the second meeting held on July 24, the Company presented its counterproposal in the form of a draft of a new contract containing substantial modifications of the existing

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[3] The Company's services constitute a link in the chain of interstate commerce, and the Company derives a substantial gross annual revenue from operations for out-of-state enterprises (J.A. 73).

contract (J.A. 75, 109-110; 10-12). Although the counterproposal contained no provision for wage rates, the Company, without specifying the exact amount it wished to put into effect, informed the Union that it was paying from 35 to 50 cents more than its competitors; that it could obtain labor for less than it was paying; and that it was unwilling to continue paying more than its competitors. In support of its position, the Company argued that it would not pay in excess of the going rates for gasoline or trucks; that it should not be expected to pay more for the "wage commodity," and that it wanted a reduction in wage rates in order to stay in competition (J.A. 76, 109-110; 10-12, 33-34, 56-57). The Company sought to discuss these economic factors at the meeting but the Union's negotiator, Roseborough, stated that the Union would not sign a contract which did not provide for a wage increase, and that the Union "would not bargain down, but always bargain up" (J.A. 76; 33, 58).[4] The union negotiator also refused to discuss "cost" items until "basic" contractual issues had been worked out (J.A. 76, 110; 10-12, 15-17).

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[4] The Union added at the next meeting held on July 30 that any new contract must also provide for an increase in health and welfare benefits (J.A. 76; 58).

B. ***The Union requests production of the Company's books; the Company furnishes data on wage rates paid by its competitors and proposes to put a wage decrease into effect***

When the parties met again on August 1, the Union kept firm in its refusal to discuss the wage issue and demanded that the Company should produce its books and records to prove its inability to pay the wage increase sought by the Union. The Company's negotiator, Schoolfield, refused such request. He stated that the Company had a lucrative business; that it was not pleading poverty or inability to pay but was losing accounts because it paid higher wages than its competitors and that it would not agree to any wage increase. (J.A. 77; 14-16). Beginning August 6, all meetings were held in the presence of a representative of the Federal Mediation and Conciliation Service, called in by the Union (J.A. 77; 17). On that day the Company presented the Union with a wage survey prepared by Schoolfield listing the wage rates paid by seven of the Company's competitors at Dallas to their drivers, warehousemen, etc., which concealed the identity of those firms by lettered designations. The survey indicated that the competitors' average wage rates were considerably below those paid by the Company under the existing contract (J.A. 77; 18, 31, G.C. Exh. 8). When Roseborough demanded to know the identity of the competing firms, Schoolfield offered to disclose it to the Federal Mediator, or some other third party, but Roseborough stated that the Union was interested in bargaining only for the Company's employees (J.A. 77-78; 34-35, 59). Actually Rose-

borough knew that the employees of the competitors were non-union and admitted that he was "reasonably sure" that their wages were below those paid by the Company (J.A. 78; 34-35). During this bargaining session, Roseborough again declined to respond to the Company's inquiry about a wage proposal and offered instead an extension of the contract beyond the termination date of August 17, subject to a 50 cents per week and per employee increase in payments to the Union's health and welfare fund (J.A. 78; 17-19).

On August 8, the Company wrote to the Union at length, reviewing its position and proposing a decrease of wages to $1.60 per hour for all classifications to be put into effect on August 17.[5] The letter also expressed the willingness of the Company to meet as often as necessary on short notice and invited the Union to suggest any solutions it might have whereby the Company might operate more competitively (J.A. 78; 5-6, 101). The Union met with the Company's employees on August 13 and informed them that the negotiations had reached a point where the parties "were more or less at a standstill." The employees voted to reject the Company's wage offer and to strike if the Company put the wage cut into effect (J.A. 110-111; 20, 46-47, 65).

Further bargaining sessions were held on August 15 and 16, 1962 (J.A. 79-80, 111; 20-24, 41-42, 44-45). Roseborough, on August 15, suggested that he

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[5] The existing wage rate was $2.15 for checkers and leadmen and $2.00 for drivers and other classifications (G.C. Exh. 2, App. A).

would present a proposal on seniority which would give the Company more flexibility in its operations and also suggested the possibility of working out a range of rates under which newly hired employees would start at a lower rate and progress gradually to the top of the rate range. The Company, however, stated that it would not be interested in a wage range which went beyond the $1.60 per hour maximum, and the Union, in turn would not agree to a rate decrease for existing employees, nor to any rate less than the 25 cent increase which it originally proposed. (J.A. 79, 111; 20-24, 63.)

On August 16, the Union presented its seniority proposal, and Schoolfield agreed that it would help to cure a problem concerning the assignment of work. Roseborough also repeated his previous suggestion that the contract be extended for 60 days with rates of pay unchanged and renewed his inquiry about a lower starting rate for new employees (J.A. 79-80; 23-24). Schoolfield stated, however, that the Company would put the wage decrease into effect and suggested that perhaps during later negotiations the matter could be worked out. He also mentioned that the Union should come forward with any solution it might have. (J.A. 79, 111; 24-25, 103.)

C. ***The Company puts the wage decrease into effect; the Union strikes; the parties continue bargaining negotiations***

The Company put the wage decrease into effect on August 17, and in its letter of announcement to the Union, stated that it expected to advise the Union if

there was any change in its position and that it expected the Union to do the same (J.A. 80; 65, 103). The Union replied on August 23 by letter in which it claimed that the Company's action constituted a refusal to bargain in good faith and demanded a rescission of the wage cut and the resumption of good faith bargaining negotiations (J.A. 80-81; 105-106). The Company wrote on August 27 that it was ready to meet and discuss whatever proposals the Union might have (J.A. 81; G.C. Exh. 12). The Union took another strike vote and commenced a strike on September 10, in which practically all the employees participated (J.A. 81; 47-48, 61). All of the strikers were replaced by September 12 (J.A. 81; 61).

The parties met again on September 24 and 27, and on October 3 and 12 (J.A. 81; 5). On September 27, the Union presented its draft of a management rights provision, which was agreed to tentatively with an amendment reserving to the Company the right to subcontract delivery work where past practice had demonstrated such subcontracting to be economically sound (J.A. 81-82; 37-39, 43-44, Resp. Exh. 2). The amendment was made in light of the fact that the Company normally subcontracted various deliveries from two of its warehouses, and on occasion used "casual" employees to do unloading work at its main warehouse (J.A. 81-82, 113; 38-39, Resp. Exh. 4). On October 12, the Union presented a strike settlement proposal in which it requested the reinstatement of all strikers, elimination of the wage cut, and some monetary benefits for the employees (J.A. 82, 113-

114; 42-43; G.C. Exh. 21). When the Company rejected the proposal, Roseborough stated, on behalf of the Union, that it would be necessary to use every means within its power to break the Company if that was necessary (J.A. 82; 70). The Union's negotiators thereupon concluded the meeting (*ibid.*).

In October 1962, the Union informed Safeway and A & P at Dallas, which used the Company's delivery services, that it intended to publicize to the customers of these stores the existence of the strike and also to picket delivery trucks of firms "allied with" the Company (J.A. 82-83, 113-114; 31-32; Resp. Exh. 1). The Company and the two stores thereupon entered upon an arrangement according to which the Company subcontracted to English City Delivery deliveries to the stores which it previously had made from one of its warehouses. The stores also arranged to have certain goods, which they had previously picked up at the company terminal, shipped to them by boxcar shipments (J.A. 84-85, 114-115). The Union protested the subcontracting by letter dated December 17, and the Company, a few days later, offered to discuss this matter with the Union (J.A. 85, 115; G.C. Exh. 22). In February 1963, the Company again wrote the Union that it was anxious to bargain on the subcontracting problem. When the parties finally met in March 1963, the Company agreed to discontinue the subcontracting and did so shortly thereafter (J.A. 86, 115; 39-40, 51-52, 64-65).

The strike still continued at the time of the hearing before the Trial Examiner in March 1963 (J.A.

115; 6). The complaint issued by the Regional Director alleged that the Company violated Section 8(a)(5) and (1) of the Act (a) by refusing to furnish on request financial records relating to respondent's justification for making a wage decrease; (b) by unilaterally changing existing wage rates and other terms and conditions of employment on August 17; (c) by unilaterally changing conditions of employment by subcontracting to English City Delivery certain cartage work performed by employees within the unit.

II. The Board's Conclusions of Law and Order

The Board dismissed the complaint. With respect to the contention that the Company violated Section 8(a)(5) and (1) by reducing wages after the expiration of the preceding labor contract, the Board found that the parties had arrived at a bargaining impasse before the Company put the wage cut into effect. The Board also found that prior thereto, the Company had bargained in good faith with the Union concerning the respective contract proposals; that it had not unduly delayed proposing the wage reduction, and that it had not taken an arbitrary attitude subsequent to the announcement of its demand but had fully, and in good faith, discussed the wage issue with the Union (J.A. 90-93, 109-113). The Board also found that the Company did not violate the Act by refusing to produce its financial records because at no time during the negotiations did the Company claim that it was unable to meet the Union's increased wage demands (J.A. 88-90, 108-109). The Board finally found that

the Company did not violate Section 8(a)(5) by subcontracting cartage work during the strike (J.A. 113-118).[6]

SUMMARY OF ARGUMENT

I. The Board properly found that the Company did not refuse to bargain in good faith by proposing a substantial decrease in the existing wage rates and by not changing its position during the course of bargaining with the Union. It is settled law that the mere inability of the parties to reach an agreement does not establish an unfair labor practice on either side. A party may take a firm position at the start of bargaining sessions and need not make concessions or recede from an announced position where such position was not taken in bad faith.

The Company in the present case took such a firm attitude, but in good faith was willing to, and did fully, discuss the wage issue with the Union during several bargaining sessions, thus complying with the requirement of the Act that the bargaining process be conducted in good faith. The issue of good faith

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[6] In the pre-hearing stipulation, the Union agreed to limit itself to a challenge of the Board's finding that the Company did not violate Section 8(a)(5) by instituting the reduced wage rates on August 17, 1962. In its brief, the Union raises an additional issue as to the propriety of the Board finding that the Company's refusal to furnish financial data was not unlawful, and suggests that this action by the Company sheds light on subsequent developments in the bargaining. The Union's argument is discussed on the merits, *infra*. The Union does not challenge the finding that the subcontracting during the strike was not unlawful.

in the matter of negotiations with a union is essentially a question of fact to be determined from the whole record.

II. When the Company unilaterally reduced the existing wage rates after the expiration of the previous labor agreement on August 17, 1962, the parties had reached a bargaining impasse. They had become deadlocked on the issue of wage rates, the Union demanding an increase in wages and health benefits, and the Company insisting on a wage cut and rejecting any other monetary improvements requested by the Union. The record does not support the assertion of the Union that it proposed to the Company a new contract with no increase in wage rates and a lower starting rate for newly hired employees to be increased gradually during the contract period. In any event, the deadlock would not have been broken by such proposal since the record supports the finding that the Company insisted on the decrease of all wage rates as a prerequisite for a new contract, as it had the right to do.

The finding that a *bona fide* impasse existed on August 17, 1962, is not negated by the fact that the parties continued the collective bargaining negotiations after that date. The willingness of the Company to meet and bargain with the Union was not inconsistent with the fact that the parties were deadlocked on the issue of wage rates. If the rule were otherwise an employer would be penalized for trying to settle a dispute by meeting with the representative of its employees at a later date when perhaps an existing deadlock might be broken.

It is settled law that after a *bona fide* impasse develops in bargaining negotiations, an employer may unilaterally put into effect the changes in wages and working conditions which it previously had offered the union.

III. The Board properly held that the Company was under no duty to inform the Union as to its financial position. The Company did not argue in support of its demand for a wage cut that it was unable to pay the existing wage rates or that it was losing money, but stated expressly that its business was lucrative and that it was not pleading inability to pay. It contended, on the other hand, that its wage rates were in excess of those paid to employees of the Company's competitors doing comparable work in the local labor market area and submitted evidence in support of this contention. Since the Company did not plead inability to pay or that the continuation of the existing rates would result in financial losses, its financial position was not relevant to the matter at issue in the bargaining negotiations, and the Union was not entitled to the information it sought. The Union's argument that the refusal to disclose financial information should be considered in evaluating the existence of a *bona fide* impasse must fall in view of the right of the Company to refuse to furnish such information.

ARGUMENT

The Board Properly Found That the Company Did Not Violate Section 8(a)(5) and (1) of the Act by Reducing Wages on August 17, 1962, After the Termination Date of the Previous Agreement

A. *Introduction: the issue*

As [redacted], *supra*, the Board found that the Company did not violate Section 8(a)(5) and (1) of the Act, by reducing its wage rates on August 17, the termination date of the prior labor agreement, after having bargained to an impasse with the Union on the issue of wages. The Union contends (Br. 9) that the Company's action constituted a refusal to bargain because there was no impasse on August 17, and moreover, (Br. 9, 14) that any impasse that existed was not "bona fide" because the Company refused to submit financial information to support its demand for a wage reduction.

The Board found that the evidence did not support a finding of bad faith bargaining by the Company, and that the parties had reached a genuine bargaining impasse before the Company's unilateral action. We submit that the Board's conclusion clearly has a "rational basis," thereby entitling it to affirmance by this Court. *Int'l Woodworkers of America* v. *N.L.R.B.*, 105 App. D.C. 37, 39, 263 F. 2d 483, 485; *Int'l Union of Electrical Radio & Machine Workers* v. *N.L.R.B.*, 273 F. 2d 243, 247 (C.A. 3); see also *Division 1142, Amalgamated Association, etc.* v. *N.L.R.B.*, 111 App. D.C. 68, 294 F. 2d 264.

B. *The Board properly found that the Company's insistence upon a reduction in wages did not show bad faith*

Section 8(d) defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, * * * but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *." It is settled that Section 8(d) lays down no rigid yardstick for the measurement of good faith, and understandably so, for "good faith" is an elastic concept that can have "meaning only in its application to the particular facts of a particular case." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 410. As the Second Circuit held in *N.L.R.B.* v. *National Shoes, Inc.*, 208 F. 2d 688, 691-692, "[t]he problem is essentially to determine from the record the intention or state of mind of the [employer] in the matter of [his] negotiations with the Union. In this proceeding, as in many others, such a determination is a question of fact determined from the whole record." Accord: *N.L.R.B.* v. *Reed & Prince*, 205 F. 2d 131, 134-135 (C.A. 1), cert. denied, 346 U.S. 887. Further, as the Supreme Court stated in *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404, "* * * it is * * * apparent from the statute itself that the * * * Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon

the substantive terms of collective bargaining agreements." A necessary corollary to this principle is that the mere failure of the parties to such negotiations to reach an agreement does not establish an unfair labor practice by either side. "While the Act compels negotiations, which usually result in reaching an agreement, it contains no authority to force an agreement where the parties have reached an impasse." *N.L.R.B.* v. *United Clay Mines Corp.*, 219 F. 2d 120, 126 (C.A. 6). "Not capitulation, but *bona fide* effort, is the criterion." *N.L.R.B.* v. *Mayer*, 196 F. 2d 286, 290 (C.A. 5).[7] And as this Court has held, refusal to bargain cannot be equated with "refusal to recede from an announced position" where there is no finding that such position was not taken in good faith. *Division 1142, Amalgamated Association* v. *N.L.R.B.*, 111 App. D.C. 68, 70, 294 F. 2d 264, 266.

As we understand the Union's position before this Court, it does not take issue with these principles. Nor does the Union dispute the Board's finding (J.A.

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[7] See also, *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 484-488; *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO* v. *Oliver*, 358 U.S. 283, 295; *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45; *Associated Unions* v. *N.L.R.B.*, 202 F. 2d 52, 55-56 (C.A. 7); *N.L.R.B.* v. *Norfolk Shipbuilding and Drydock Corporation*, 195 F. 2d 632, 634 (C.A. 4); *N.L.R.B.* v. *Herman Sausage Co.*, 275 F. 2d 229, 231-232 (C.A. 5); *N.L.R.B.* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, 721 (C.A. 2); *N.L.R.B.* v. *Clegg*, 304 F. 2d 168, 176 (C.A. 8); *N.L.R.B.* v. *Almeida Bus Lines*, 333 F. 2d 729 (C.A. 1).

112) that the "Company did not adopt an arbitrary attitude subsequent to specifying the amount of its proposed wage change on August 8, but in good faith was willing to, and did fully, discuss the wage with the Union." [8] Rather, the Union argues that because of the absence of an impasse on August 17 the Company violated the Act by its unilateral wage decrease (Br. 10-14) and that because of the Company's refusal to produce financial data there was no *bona fide* impasse on that date (Br. 14-16). We show below that both arguments are unfounded.

C. *The Board properly found that the parties had reached a bargaining impasse by August 17, 1962*

As set out in the statement (*supra*, pp. 3-7) during the several bargaining sessions held in July and August 1962, the parties took positions on the issues of wage rates that were in hopeless conflict and could not be reconciled either by direct negotiations or by bargaining with the assistance of a federal mediator. The Board, in summarizing the events during the last two sessions before the wage cut, the sessions held on August 15 and 16, stated that "neither the Union

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[8] See also the further findings, not disputed by the Union, that the "Union knew almost from the outset of the negotiations of the [Company's] desire for, and its reasons in support of, a wage reduction" (J.A. 112), and that after the Company announced the specific wage decrease it desired by its letter of August 8, the two meetings on August 15 and 16 "were plainly adequate for enabling the parties to explore further and fully their respective positions which had been stated in general terms early in the negotiations * * *" (J.A. 91).

nor the [Company] showed any disposition to recede from its respective basic position—the Union demanding a wage increase, and the [Company] insisting on a decrease," and that "at the conclusion of the August 16 meeting neither party desired to set a date for a future meeting although both parties indicated a willingness to meet at any time" (J.A. 111). The Board concluded from these facts (J.A. 111), that the "issue of wages was the sole impediment to reaching a contract at the time the [Company] placed in effect the wage decrease, and that after the bargaining sessions on August 16 and 17 the parties had arrived at a bargaining impasse on that issue." The Board noted (J.A. 112), that the Company was willing to discuss the wage issue in the future, but concluded that such agreement to meet "reflected nothing more than a recognition of [the Company's] continuing obligation to meet with the Union," and that it "did not remove the wage impasse at which the parties had arrived by August 17." [9]

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[9] The Trial Examiner found (J.A. 90-92) that there was no "impasse" but that the Company, nevertheless, had not violated Section 8(a)(5) by putting the wage increase into effect because it had discussed it with the Union so that there was no "refusal to negotiate" within the meaning of *N.L.R.B.* v. *Katz*, 369 U.S. 736, 747. The Board (J.A. 109) did not find it necessary to consider this finding of the Trial Examiner because of its conclusion that the parties had bargained to an impasse.

Since both the Board and the Trial Examiner reached the same final conclusion, albeit by a different reasoning, and since the disagreement involves conclusions of law and not credibility determinations, the Trial Examiner's finding on the issue of impasse is not entitled to special weight. *Ware-*

The Union claims (Br. 5, 13-14) that the record does not support the finding of a deadlock on August 17. It relies on the testimony of its negotiator, Roseborough, that on that date he would have been willing to enter into a contract with no wage increase, subject to the approval of his membership (J.A. 29). However, the record does not indicate that Roseborough communicated such as intention to the Company. Further, Roseborough admitted that his recollection was faulty as to specific discussions at any particular meeting (J.A. 76; 14, 23, 33). The Examiner found that in the two bargaining sessions held after August 8, "though the Union suggested a lower starting rate for new employees it made no reduction in the increase which it sought for the old ones" J.A. 91; 79-80). The Board's finding of an impasse is supported by Roseborough's admission that the Union would not "bargain down, but always bargain up" (J.A. 33), and by the testimony of Huntington, one of the Company negotiators, that he participated in all bargaining sessions and that the Union declared it was not going to negotiate a contract without a wage increase (J.A. 55-56, 63). In any event, even assuming, *arguendo*, that Roseborough communicated to the

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housemen and Mail Order Employees etc. v. *N.L.R.B.*, 112 App. D.C. 280, 302 F.2d 865; *Los Angeles Mailers Union No. 9* v. *N.L.R.B.*, 114 App. D.C. 72, 75, 311 F.2d 121, 124; *United Furniture Workers of America* v. *N.L.R.B.*, 118 App. D.C. 350, 352, 336 F. 2d 738, 740, cert. denied, 379 U.S. 838; *Int'l Union United Auto, etc. Workers* v. *N.L.R.B.*, ——App. D.C. ——, ——, 344 F. 2d 171, 172. Accord: *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 494, 496.

Company the concession he had in mind, this would not have broken the existing deadlock. He testified that he was willing to have a lower starting rate for newly hired employees gradually increasing to the existing top rate $2.00 per hour with no wage cut for the 28 to 30 employees in the unit then on the payroll, whereas the Company insisted on a wage reduction of from 40 to 55¢ per hour in the existing wage rate of all classifications (J.A. 26-30, 54-55, 63, see Union Br. 4).

We submit that the finding of the Board concerning the impasse in the bargaining negotiations is well supported by the record considered as a whole, and that accordingly the Company did not violate Section 8(a)(5) in taking unilateral action on the issue as to which the impasse existed. *N.L.R.B.* v. *Crompton-Highland Mills*, 337 U.S. 217, 224; *N.L.R.B.* v. *Katz*, 369 U.S. 736, 741-742, 745; *N.L.R.B.* v. *Landis Tool Co.*, 193 F. 2d 279, 289-282 (C.A. 3); *Fetzer Television, Inc.* v. *N.L.R.B.*, 317 F. 2d 420, 424 (C.A. 6); *N.L.R.B.* v. *Tex-Tan, Inc.*, 318 F. 2d 472, 479-482 (C.A. 5); *N.L.R.B.* v. *Almeida Bus Lines*, 333 F. 2d 729, 734-735 (C.A. 1); Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1423 (1958); see also, *The American Shipbuilding Co.* v. *N.L.R.B.*, 380 U.S. 300, 303-305, and concurring opinion of Mr. Justice Goldberg, in which the Chief Justice joined, 380 U.S. 329-330, 337.[10] These authorities establish

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[10] The Union's reliance (Br. 11) on *Bradley Washfountain*, 89 NLRB 1662, is misplaced. In that case the Board found that there was no impasse because the employer's first uni-

the rule of law that where there has been a good faith but unsuccessful attempt to reach an agreement with a union and the parties are deadlocked, the employer may put into effect changes proposed by it which it has previously discussed with the union and of which the union has been put on notice. Whether an impasse exists is a question of fact for the Board to be decided on the whole record,[11] and in making such a determination the Board is entitled to consider that "the Act does not encourage a party to engage in fruitless marathon discussions." *N.L.R.B.* v. *American-National Insurance Co.*, 343 U.S. 395, 404.

Likewise without merit is the Union's contention (Br. 11-12) that because bargaining sessions continued after August 17, no impasse could have been found as of that date, even though the subsequent negotiations did not result in any agreement. This

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lateral action occurred directly after the initial formal meeting with the union—the only occasion on which the parties had discussed the union's requests, and that the parties had not adopted such positions of inflexibility as to warrant a belief that further negotiations would be futile; also that the employer took unilateral action not once but three times, thus indicating that its purpose was to undermine the union's prestige as bargaining agent (at 1665-1666). The Seventh Circuit in denying enforcement of the Board's decision held that the employer in granting increases that were almost as large as those demanded by the union did not act unilaterally and that the facts could not be construed as disparaging or undermining that union, particularly in view of the long amicable relationship between the parties. (*N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 150-152.)

[11] See *Katz, supra*, 369 U.S. 736, n. 7, and *American Shipbuilding, supra*, 380 U.S. at 303.

proposition, if accepted, would be inconsistent with the policies of the Act, because it would require an employer who honestly claims an impasse, in order to protect his legal position to refuse to negotiate further, even though further negotiations might lead to settlement of the dispute. The Fifth Circuit recognized this fact in *N.L.R.B.* v. *Intracoastal Terminal, Inc.*, 286 F. 2d 954, 958, where it held that the parties had reached a bargaining impasse even though the employers' last letter to the Union had "properly" stated that the employers "were not shutting the door to any further proposals or offers to negotiate." The Union (Br. 11) misconceives the statement of the Supreme Court in *N.L.R.B.* v. *Katz*, 369 U.S. 736, 741, fn. 7, to the effect that "as long as there is a continued willingness [to negotiate] and no impasse has developed the employer's obligation continues." The Court there held that the employer violated the Act by making unilateral changes prior to "the existence of any possible impasse." *Id.* at 742. It is clear that the Court there did not pass on the situation where the employer institutes unilateral changes on matters as to which the parties have bargained to an impasse, and nothing in the decision supports the proposition suggested by the Union that continued willingness of the employer to meet with the Union compels it to maintain the *status quo* even on issues where the impasse exists.

D. *The Board properly found that the Company's refusal to produce its financial records was not violative of Section 8(a)(5).*

The Union argues (Br. 14-15) that it was entitled to information concerning the Company's financial position as a result of the Company's proposal to decrease wage rates. The Union seems to equate such a demand with a plea of financial inability to pay higher wages or to maintain existing wages. This is manifestly wrong for not every rejection of a wage demand by a union or request for decrease by an employer is based on inability to pay. It may well be based, as was the case here on the contention that the prevailing wage rates paid for comparable occupations by other employers in the labor market calls for such a measure. Just as a union may base its demand for a wage increase on this comparability argument, without going into the issue of the employer's ability to pay, so may an employer propose a change because he considers it inequitable to pay wages in excess of those paid by competing employers, without making the claim of inability to continue present wage rates. In short, the financial position of the employer becomes a relevant issue in wage negotiations only where it is used to resist a union demand or to justify an employer demand.

It is settled that a union is entitled only to information that is *relevant* to the issues under consideration. *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149, *Int'l Woodworkers of America* v. *N.L.R.B.*, 105 App. D.C. 68, 263 F. 2d 483; *J.I. Case* v. *N.L.R.B.*, 253 F. 2d 149, 153-154 (C.A. 7); *Curtiss-Wright Corp.* v.

N.L.R.B., 347 F. 2d 61, 68-69, (C.A. 3); see also *Fruit & Vegetable Packers* v. *N.L.R.B.*, 114 App. D.C. 388, 316 F. 2d 389, 390-391. Thus in *Truitt, supra,* the employer resisted the union's wage demand on the ground that he could not meet it and that, if he did, he would have to go out of business. The Union demanded evidence of the employer's financial status, claiming that the information was essential so that the employees could determine whether they should persist in their demand. The Court held that such evidence should be furnished, explicating its holding as follows (351 U.S. at 152-153): "Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining it is important enough to require some sort of proof of its accuracy." The Court also pointed out that in such a situation substantiation of an employer's claim may result in a settlement because "[c]laims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business conditions; employees have even voted to accept wage decreases because of such conditions." *Id.* at 152. This reasoning clearly does not apply to the present situation, where the relevant issue was whether the Company was paying higher wages than its competitors in the labor market and the Company furnished to the Union evidence in support of such contention.

Boulevard Storage & Moving Co., 152 NLRB No. 51, 59 LRRM 1136, strongly relied upon by the Union (Br. 10, 14, 15) is inapposite because of relevant factual differences. In that case the union represented both local and over-the-road drivers of the employers. The employers demanded a wage cut applicable to all employees on the ground that their *local* operations were not making a profit, stating "that unless an overall cut was made they could not become competitive in their local moving as to which they were assertedly losing money." (59 LRRM at 1137). The Board (Members Fanning and Brown, with Member Jenkins dissenting) held that the employers' claim was "equivalent to a plea of inability to pay," and that the union was entitled to obtain substantiating data in support of this plea. In addition, the Board held that certain information as to *local* moving costs furnished by the employers was insufficient because it would not permit an intelligent evaluation of the employers' declared necessity for an overall wage cut. This is different from the case at bar where the Company did not claim financial losses or inability to pay and, therefore, the information demanded by the Union was not relevant.

CONCLUSION

For the reasons stated we submit that the Board's decision herein is supported by substantial evidence on the record as a whole, and that the Union has not met the burden of showing any error in the relevant findings of fact and conclusions of law of the Board. Therefore, the petition for review should be denied.

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BRIEF FOR INTERVENOR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,265

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

EMPIRE TERMINAL WAREHOUSE COMPANY,

Intervenor.

On Petition to Review an Order of the National Labor Relations Board

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STATEMENT OF QUESTIONS PRESENTED

The questions presented, as agreed to in a pre-hearing stipulation approved by this Court on May 17, 1965, are as follows:

1. Whether the Board erred in finding that the Company did not violate Section 8(a)(5) and (1) of the Act by reducing wages on or about August 17, 1962.

2. Whether the Board erred in finding that the parties had arrived at a bargaining impasse after the collective bargaining session of August 16, 1962.

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BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF THE CASE

The Petitioner's statement of the case as set out in its brief is accurate, but incomplete.

From the early negotiations, your Intervenor (hereinafter called the Company) continually sought to discuss and negotiate on wages. Petitioner (hereinafter called the Union) consistently refused "until the non-economic matters had been agreed upon" (J.A. 15-17). Between the dates of August 8, 1962, when the Company notified Petitioner of its wage proposal and August 17, 1962, when the wage reduction was instituted, Petitioner held a meeting with its members on August 13, wherein they rejected the Company's proposals for the decrease and at the same time refused to authorize the Union negotiators to retreat from the twenty-five cent per hour increase that they had requested (J.A. 46-47).

In the negotiating session of August 16, 1962, the Union proposed to lower their demands for wage increase conditioned upon an extension of the contract for sixty (60) days (J.A. 22, 28). This, the Company rejected and stood by its proposals to reduce wages to $1.60 across the board. No agreement was reached. The parties just "hung there" (J.A. 22-23). No future meeting was scheduled because neither party felt they had anything more to discuss, but it was agreed that if either party wanted to meet again, they could schedule another meeting, "when the spirit moved them" (J.A. 45).

From early in negotiations, the Company had announced that it was seeking a wage decrease (J.A. 33) and the Union in response, had announced that it would not bargain down but always up. This was said in every session (J.A. 33). (See also J.A. 63 where the Union stated it would not sign a contract without a wage increase.) Even on August 13, during the Union meeting the negotiators told the employees that the parties were at a "standstill" (J.A. 47).

From the beginning, the Union was advised that the Company would not agree to a wage increase but that this was not based on a plea of poverty or on an inability to pay, but simply that the Company was unwilling to pay more than its competitors were paying for its labor. (J.A. 16, 33-34). The Company stated that it was at the time a profitable business and since it was not pleading poverty, refused to show its books.

The Company did produce for the Union substantiating evidence in support of its negotiating position (J.A. 34-35).

The Trial Examiner held that there was no impasse on the wage issue only because "further bargaining was plainly contemplated at the time." The Board rejected this conclusion of the Examiner.

SUMMARY OF ARGUMENT

A unilateral wage reduction following a bargaining impasse does not constitute a refusal to bargain. A genuine bargaining impasse was reached by the parties in their bargaining sessions.

The Company did not plead an inability to pay a wage increase during the bargaining negotiations and therefore does not, as a matter of law, have to produce financial records to support its demanded wage decrease. The Company announced early in negotiations that it was a thriving, profitable business and that it could afford to pay any wage increase, but that it did not see fit to pay more for the "labor commodity" than did its competitors. The Company supported its position with an undisputed survey of wage rates paid by competitors in the industry. Further, the Petitioner should not be permitted to argue that the Company's refusal to produce financial data should be considered in evaluating the existence of a *bona fide* impasse in light of the pre-hearing stipulation.

ARGUMENT

A.

A BONA FIDE IMPASSE WAS REACHED BY THE PARTIES

The Petitioner argues that the Board's finding of impasse is grounded upon a serious misconception of the record, that the Union showed no disposition to recede from its demanded wage increase. The record clearly supports the Board in this finding. From the beginning of the negotiations, the Company announced that it was seeking a wage decrease and the Union

persistently responded by announcing that it would never bargain down, but always up, and that there would be no contract without wage benefits. Although during the last bargaining session, the Petitioner indicated that it might modify its wage demand, conditioned on a sixty (60) day extension of the expiring contract, it never receded from its position that it was seeking a wage increase and would not consider any form of wage decrease. The record clearly shows that wages were the only issue separating the parties and that on that issue they *"just hung there."* So adamant were the parties in their respective positions that no further bargaining sessions were scheduled, but it was agreed that they would meet if and *when the spirit moved them.* The Union announced to its membership that the parties were at a *standstill.*.

The Trial Examiner found that because further bargaining was plainly contemplated at the time, there was no impasse on the wage issue (J.A. 91).

This theory of the Trial Examiner is completely at odds with the case law of the Labor Board and the Courts.[1]

The existence of an impasse does not destroy the authority of the bargaining representative or the right of the employee to seek by collective action to persuade the employer to accept their collective position as to terms which shall govern the employment relationship. See *Central Metallic Casket Co.*, 91 NLRB 572. This is logical reasoning for just as surely as a strike breaks an impasse,[2] any change in the bargaining position of either party would likewise break the impasse and both parties would be required to bargain further on the new issues,

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[1] Boeing Airplane Co., 80 NLRB 447, the Board said:

> "An impasse does not constitute a license to avoid the statutory obligation to bargain collectively where the circumstances which led to the impasse no longer remain in status quo."

NLRB v. Bradley Washfountain Co., 192 F.2d 144.

[2] NLRB v. U. S. Cold Storage Corp (C.A. 5, 1953) 203 F. Supp. 924, cert. denied, 346 U.S. 818.

while the Union continued to represent a majority of the employees.[3] Further bargaining must always be considered or contemplated for as the Board has said, futility of further bargaining is never to be assumed. *Kinard Trucking Co.*, 152 NLRB No. 52.

The parties in the instant matter were adamant in their position at the time, but both properly left the door open for future negotiations in the event there were changes of position or attitude. Said the Court in *NLRB v. Intercoastal Terminal, Inc.*, 286 F.2d 954:

> "While properly stating that Respondents were not shutting the door to any further proposals or offers to negotiate, the Respondent by their letter of January 10 and the union by its conduct in not attempting further negotiations until more than six months had elapsed, brought about a true impasse."

After the Union and the Company concluded their negotiations of August 16, 1962, (it is repeated) that both parties agreed they would meet again only when the spirit moved them. The spirit moved neither party until overtures were made for the purpose of settling the strike which commenced on September 10, 1962. If, after reaching an impasse, either party refused to come forward to negotiate new or modified positions merely because there had been an impasse, they would be in serious violation of the Act by reason of their refusal to bargain.[4]

It is the unilateral action which implies cessation of recognition of the Union or a rejection of the bargaining authority of the Union which is unlawful, not unilateral action *per se*. Here, there was no such action with such implications, nor was there any undermining of the bargaining process.[5] Such a situation is an impasse.

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[3] Boeing Airplane Co., supra.

[4] Ibid.

[5] "It is true that ordinarily a good faith bargaining impasse connotes the futility of further negotiations and in the case of the employer party to the collective relation leaves the employer free to take certain economic steps not dependent upon the mutual consent of the union." Central Metallic Casket Co., supra. See also Landis Tool Co., 193 F.2d 279.

Petitioner cites the *Katz*[6] case that "a continued willingness to negotiate" is totally inconsistent with any notion of impasse. For the convenience of the Court, we are here setting out the entire text from which the quotation was drawn:

> "Engaging in partial strikes is not inherently inconsistent with *a continued willingness to negotiate;* and as long as there is such willingness *and* no impasse has developed the employer's obligation (to bargain) continues." 369 U.S. 736 (Fn. 7) (Emphasis added)

The Trial Examiner, in citing the *Katz* case, noted footnote 12 where the Court said:

> "Of course, there is no resemblance between this situation and one wherein an employer after notice and consultation, 'unilaterally', institutes a wage increase identical with the one which the union has rejected as too low."

Here, the Union and its membership rejected the Company's offer on August 13, 1962 in its Union meeting.

B.

THE COMPANY DID NOT PLEAD POVERTY AND THERE WAS NEVER ANY NECESSITY FOR IT TO PRESENT ITS BOOKS

From early in the beginning of the negotiations between the parties, the Company let it be known to the Union that it was seeking a wage reduction. Immediately, the Union asked to see the Company's books. This was denied to the Union with the explanation that the Company was not pleading a poverty or loss situation, but simply that it was unwilling to continue paying wages substantially higher than that of its competitors. Nevertheless, the Union persisted in demanding books relying on this request alone. The production of the books or financial records of the

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[6] NLRB v. Katz, 369 U.S. 736.

Company would have rendered the Union no better able to intelligently negotiate since the books would have shown indeed that the Company was making a profit, as it contended it was. Moreover, the Company agreed that it *could* afford to pay the requested wage increase, but that it simply was unwilling to do so (J.A. 16).

It was the position of the Company that it was paying more for the "labor commodity" than its competitors and it felt that it could get the same labor at a less rate. This is bargaining in its true sense. It is the seeking of a balance between economic operation on the one hand and economic strike on the opposing hand.

The Company explained its position in this connection and offered the Union documents to support the accurateness of the Company's argument. This is directly in line with the holding in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, wherein the Supreme Court pointed out that where a plea of poverty or other economic position was made, the employer was obligated upon request or demand to support its position by a demonstration of documentary proof sufficient to enable the union to thoroughly understand the company's position and to intelligently bargain on the matter. The *Truitt* case does not stand for the proposition that upon a plea of poverty there is no other solution but to produce books and records. The *Truitt* case states only that the company is obligated to present proof by record or otherwise, of the correctness of its position.

The instant case does not fall within that gambit. There was no plea of poverty, but on the contrary, there was an admission of profit. The Company merely wanted to widen its margin of profit.

Nonetheless, the substantiating data of the wages paid by competitors of your Intervenor was offered to the Union who rejected it on the admission of its accuracy.

The case of *Boulevard Storage & Moving Co.*, 152 NLRB No. 51, cited by Petitioner, is distinguishable. There, the Employer claimed that the local moving phase of their operations was not making any profit

and that it was unable to stay competitive with the many non-union moving companies in the area. Said the Board:

> "We agree with the Trial Examiner that the Act requires an employer engaged in collective bargaining to produce *substantiating data,* at the request of a union where the employer pleads financial inability to pay a proposed wage increase or takes a position that it is compelled to cut wages and that an employer's claim that it could not grant an increase and remain competitive so as to avoid losses is equivalent to a plea of inability to pay." (Emphasis added)

In the instant matter, the employer asserted that it was a profitable operation, but was simply unwilling to pay more for the wage commodity than were its competitors. The Board pointed out in the *Boulevard* case that the company there stated that "because of the very severe competitive and economic problems we were confronted with concerning local hauling the proposed wage increase could not be granted. The Respondent there was *assertedly losing money;* manifestly, this was a plea of inability to take any action with respect to wages except to reduce them, albeit grounded upon the asserted necessity for economic relief in one phase of Respondent's operation . . ."

There was no such assertion in the instant matter, but on the contrary, there was the assertion of a profitable operating organization.

Except for this failure to produce records in the *Boulevard* case, the Board would have found an impasse. The Board pointed out that the Respondent's refusal to submit all relevant data contributed significantly to any deadlock in negotiations which have existed at that time. This conduct on the part of the Respondent precluded any harmonious resolution of the wage dispute that might have taken place had meaningful bargaining been fostered by the furnishing of such data. In the instant matter, the Union was well aware of the Company's position and its reasons and it had been offered substantiating data. To furnish the books and records of your Intervenor to the Union Petitioner herein would have availed the

Union nothing but affirmation of the Company's assertions that it was a profitable operation.

Accordingly, the *Boulevard Storage & Moving Co.* case relied upon by Petitioner to raise a point not included in the pre-hearing stipulation, is not applicable even to that point.

Your Intervenor urges that the argument of Petitioner in this regard be rejected.

CONCLUSION

The Board was correct in finding and concluding that a *bona fide* impasse existed. In any event, there is no case which precluded a unilateral action before impasse where there has been notification and consultation with the Union. *NLRB v. Bradley Washfountain Co.*, 192 F.2d 144, 150-152. The Board's Decision and Order should be sustained and the Petitioner's request for review denied.

Respectfully submitted,

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